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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MONTANA

FROM NOVEMBER 21, 1914, TO APRIL 28, 1915

OFFICIAL REPORT

VOLUME 50

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1915

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JUSTICES
OF
THE SUPREME COURT OF THE STATE OF MONTANA,
DURING THE TIME OF THESE REPORTS.

THE HON. THEO. BRANTLY, Chief Justice.
THE HON. SYDNEY SANNER,
***THE HON. WILLIAM L. HOLLOWAY,** } **Associate Justices.**

OFFICERS OF THE COURT:

†JOSEPH B. POINDEXTER, Attorney General.
W. H. POORMAN, Asst. Attorney General.
J. H. ALVORD, Asst. Attorney General.
CHAS. S. WAGNER, Asst. Attorney General.
††JOHN T. CARROLL, Clerk.
MARSHALL N. RACE, Marshal.
AUGUST C. SCHNEIDER, Court Stenographer.

*Re-elected November 3, 1914.

†Appointed June 1, 1915, to succeed D. M. Kelly, resigned.

††Appointed June 17, 1915, to succeed John T. Athey, who died June 13, 1915.

ATTORNEYS AND COUNSELORS AT LAW.

Admitted from December 24, 1914, to June 21, 1915.

CALLICOTTE, J. W., February 8, 1915.
COLLINS, FRANKLIN W., January 18, 1915.
COSTELLO, W. P., March 15, 1915.
COTTON, CLAUDE G., January 11, 1915.
CUDHIE, GEORGE, March 1, 1915.

EDQUIST, REUBEN C., April 5, 1915.

GABRIEL, FRED. C., April 26, 1915.
GOODWIN, LEONARD, February 15, 1915.
GRIBBLE, ULYSSES A., January 18, 1915.

HEMPHILL, ARTHUR S., April 28, 1915.

LAIDLAW, WILLIAM J., January 25, 1915.
LINDERMAN, LEO C., February 8, 1915.
LUNDQUIST, EDWIN L., May 10, 1915.

MACDONALD, WM. E., April 12, 1915.
MANSUR, HENRY A., March 8, 1915.
MCELMEEK, OWEN P., February 8, 1915.
MCKENNA, J. E., February 15, 1915.
MCKENZIE, JOHN, March 8, 1915.
MILLER, C. J., May 24, 1915.
MURPHY, JOHN P., February 15, 1915.

OLANDER, E. T., June 7, 1915.
OLESON, HENRIK W., March 8, 1915.

PETERSON, ERNEST A., February 8, 1915.
PALMETER, R. A., April 26, 1915.

RHODY, M. V., May 17, 1915.
RIEGL, GUY H., June 21, 1915.

SCHLEHER, ARTHUR F., February 23, 1915.
SLAGLE, AARON, March 29, 1915.
SORENSEN, PERRY M., April 19, 1915.
STEVENS, LOUIS C., February 8, 1915.
STEWART, JESSE A., January 4, 1915.

WAGENEN, FRANK VAN, April 19, 1915.
WAITE, ARTHUR G., January 11, 1915.
WALTERS, GEO. STANLEY, February 1, 1915.
WEAVER, JAMES O., May 8, 1915.
WILKINS, BEN H., March 16, 1915.
WOLFE, HENRY L. JR., February 8, 1915.



DIRECTORY
OF THE
JUDICIAL DISTRICTS OF THE STATE OF MONTANA.
1915.

FIRST JUDICIAL DISTRICT.

County of Lewis and Clark. County Seat, Helena.
District Judges: Hon. James M. Clements; Hon. J. Miller Smith.
Officers: County Attorney, Andrew H. McConnell, Esq.
Clerk of District Court, F. L. Reece.
Sheriff, Rolla Duncan.

SECOND JUDICIAL DISTRICT.

County of Silver Bow. County Seat, Butte.
District Judges: Hon. Michael Donlan; Hon. J. J. Lynch; Hon.
J. B. McClernan.
Officers: County Attorney, M. F. Canning, Esq.
Clerk of District Court, John J. Foley.
Sheriff, Chas. S. Henderson.

THIRD JUDICIAL DISTRICT.

Counties of Deer Lodge, Powell and Granite.
District Judge: Hon. George B. Winston.
Officers of Deer Lodge County (County Seat, Anaconda):
County Attorney, John W. James.
Clerk of District Court, M. L. McDermott.
Sheriff, B. N. Bryan.

Officers of Powell County (County Seat, Deer Lodge) :

County Attorney, Thos. F. Shea, Esq.

Clerk of District Court, Robert Midtlyng.

Sheriff, Jos. E. Neville.

Officers of Granite County (County Seat, Philipsburg) :

County Attorney, David M. Durfee, Esq.

Clerk of District Court, Wm. B. Calhoun.

Sheriff, Daniel A. McLeod.

FOURTH JUDICIAL DISTRICT.

Counties of Mineral, Missoula, Ravalli and Sanders.

District Judges: Hon. A. L. Duncan; Hon. R. Lee McCullough;

Hon. Theodore Lentz.

Officers of Mineral County (County Seat, Superior) :

County Attorney, Wilfrid L. Hyde.

Clerk of District Court, George L. Dean.

Sheriff, A. F. Klugman.

Officers of Missoula County (County Seat, Missoula) :

County Attorney, F. C. Webster, Esq.

Clerk of District Court, Thos. P. Conlon.

Sheriff, R. J. Whitaker.

Officers of Ravalli County (County Seat, Hamilton) :

County Attorney, E. C. Kurtz, Esq.

Clerk of District Court, J. T. Coughenour.

Sheriff, B. S. Chaffin.

Officers of Sanders County (County Seat, Thompson Falls) :

County Attorney, Wade R. Parks, Esq.

Clerk of District Court, Wm. Strom.

Sheriff, Joseph L. Hartman.

FIFTH JUDICIAL DISTRICT.

Counties of Beaverhead, Jefferson and Madison.

District Judges: *Hon. Joseph B. Poindexter; Hon. W. A. Clark.

Officers of Beaverhead County (County Seat, Dillon):

County Attorney, Roy S. Stephenson, Esq.

Clerk of District Court, Chas. W. Conger.

Sheriff, Daniel V. Erwin.

Officers of Jefferson County (County Seat, Boulder):

County Attorney, J. E. Kelly, Esq.

Clerk of District Court, W. B. Hundley.

Sheriff, P. J. Manning.

Officers of Madison County (County Seat, Virginia City):

County Attorney, Geo. R. Allen, Esq.

Clerk of District Court, Matt Carey.

Sheriff, Elijah Adams.

SIXTH JUDICIAL DISTRICT.

Counties of Park, Stillwater and Sweet Grass.

District Judge: Hon. Albert P. Stark.

Officers of Park County (County Seat, Livingston):

County Attorney, Frank Arnold, Esq.

Clerk of District Court, Wm. Pethybridge.

Sheriff, A. S. Robertson.

Officers of Stillwater County (County Seat, Columbus):

County Attorney, P. R. Heily, Esq.

Clerk of District Court, G. Iverson.

Sheriff, Robert Guthrie.

Officers of Sweet Grass County (County Seat, Big Timber):

County Attorney, R. S. Steiner, Esq.

Clerk of District Court, H. C. Pound.

Sheriff, H. G. Lyons.

*Resigned to accept appointment as Attorney General of Montana; successor not yet appointed.

*SEVENTH JUDICIAL DISTRICT.

Counties of Dawson, Richland and Wibaux.

District Judge: Hon. C. C. Hurley.

Officers of Dawson County (County Seat, Glendive):

County Attorney, S. E. Felt, Esq.

Clerk of District Court, Frank Parrett.

Sheriff, Geo. Twibble, Jr.

Officers of Richland County (County Seat, Sidney):

County Attorney, Herbert H. Hoar, Esq.

Clerk of District Court, Guy L. Rood.

Sheriff, Geo. W. Arkle.

Officers of Wibaux County (County Seat, Wibaux):

County Attorney, Edward F. Fisher, Esq.

Clerk of District Court, A. E. Jeffers.

Sheriff, J. W. Jones.

EIGHTH JUDICIAL DISTRICT.

Counties of Cascade, Teton, and Toole.

District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.

Officers of Cascade County (County Seat, Great Falls):

County Attorney, Geo. A. Judson, Esq.

Clerk of District Court, Geo. Harper.

Sheriff, Louis H. Kommers.

Officers of Teton County (County Seat, Chouteau):

County Attorney, John J. Greene, Esq.

Clerk of District Court, James Gibson.

Sheriff, William Miller.

Officers of Toole County (County Seat, Shelby):

County Attorney, J. G. Henderson, Esq.

Clerk of District Court, Perry J. Day.

Sheriff, J. S. Alsup.

*Boundaries of Seventh Judicial District changed by section 2 of Chapter 50, p. 73, Laws of 1915.

NINTH JUDICIAL DISTRICT.

County of Gallatin. County Seat, Bozeman.

District Judge: Hon. Ben. B. Law.

Officers: County Attorney, H. A. Bolinger, Esq.

Clerk of District Court, W. L. Hays.

Sheriff, D. E. Gray.

TENTH JUDICIAL DISTRICT.

County of Fergus. County Seat, Lewistown.

District Judge: Hon. Roy E. Ayers.

Officers: County Attorney, Frank A. Wright, Esq.

Clerk of District Court, James L. Martin.

Sheriff, Firmin Tullock.

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Lincoln.

***District Judge: Hon. T. A. Thompson.**

Officers of Flathead County (County Seat, Kalispell):

County Attorney, John E. Erickson, Esq.

Clerk of District Court, Sam. D. McNeely.

Sheriff, J. H. Metcalf.

Officers of Lincoln County (County Seat, Libby):

County Attorney, Jas. M. Blackford, Esq.

Clerk of District Court, Timothy Miller.

Sheriff, Waverly L. Brown.

***Appointed March 1, 1915, to succeed Hon. John E. Erickson, resigned.**

***TWELFTH JUDICIAL DISTRICT.**

Counties of Blaine, Chouteau and Hill.

District Judge: Hon. John W. Tattan.

Officers of Blaine County (County Seat, Chinook):

County Attorney, D. J. Sias, Jr., Esq.

Clerk of District Court, A. W. Ziebarth.

Sheriff, Jas. Buckley.

Officers of Chouteau County (County Seat, Fort Benton):

County Attorney, H. F. Miller, Esq.

Clerk of District Court, Geo. D. Patterson.

Sheriff, I. M. Rogers.

Officers of Hill County (County Seat, Havre):

County Attorney, L. V. Beaulieu, Esq.

Clerk of District Court, Geo. W. Glass.

Sheriff, H. E. Loranger.

****THIRTEENTH JUDICIAL DISTRICT.**

Counties of Carbon, Big Horn and Yellowstone.

District Judges: Hon. Geo. W. Pierson; †Hon. A. C. Spencer.

Officers of Carbon County (County Seat, Red Lodge):

County Attorney, R. G. Wiggenhorn, Esq.

Clerk of District Court, H. A. Simmons.

Sheriff, W. H. Gebo.

Officers of Big Horn County (County Seat, Hardin):

County Attorney, H. W. Bunston, Esq.

Clerk of District Court, Frank A. Nolan.

Sheriff, Dewey Riddle.

Officers of Yellowstone County (County Seat, Billings):

County Attorney, Jas. L. Davis, Esq.

Clerk of District Court, Lorin T. Jones.

Sheriff, S. W. Matlock.

*Boundaries of Twelfth Judicial District changed by section 2 of Chapter 144, Laws of 1915, p. 358.

**Boundaries of Thirteenth Judicial District changed by section 2 of Chapter 51, Laws of 1915, p. 74.

†Appointed May 13, 1915, to succeed Hon. Chas. L. Crum, appointed Judge of the Fifteenth Judicial District.

FOURTEENTH JUDICIAL DISTRICT.

Counties of Meagher and Broadwater.

District Judge: Hon. John A. Matthews.

Officers of Meagher County (County Seat, White Sulphur Springs):

County Attorney, C. A. Linn, Esq.

Clerk of District Court, F. H. Mayn.

Sheriff, Geo. B. Nagues.

Officers of Broadwater County (County Seat, Townsend):

County Attorney, Chas. P. Cotter, Esq.

Clerk of District Court, Fred Bubser.

Sheriff, Chas. B. Doggett.

1

***FIFTEENTH JUDICIAL DISTRICT.**

Counties of Rosebud and Musselshell.

†District Judge: Hon. Chas. L. Crum.

Officers of Rosebud County (County Seat, Forsyth):

County Attorney, B. D. Tull, Esq.

Clerk of District Court, D. J. Muri.

Sheriff, Henry Grierson.

Officers of Musselshell County (County Seat, Roundup):

County Attorney, Garry J. Jeffries, Esq.

Clerk of District Court, W. G. Jarrett.

Sheriff, J. L. Fisco.

*Created by Act of Fourteenth Legislative Assembly, approved March 1, 1915 (Laws of 1915, Chap. 51, p. 74).

†Appointed March 1, 1915.

***SIXTEENTH JUDICIAL DISTRICT.**

Counties of Custer, Fallon and Prairie.

****District Judge:** Hon. Daniel L. O'Hern.

Officers of Custer County (County Seat, Miles City):

County Attorney, Frank Hunter, Esq.

Clerk of District Court, Jas. G. Ramsay.

Sheriff, Austin B. Middleton.

Officers of Fallon County (County Seat, Baker):

County Attorney, Chas. J. Dousman, Esq.

Clerk of District Court, Ralph Keener.

Sheriff, M. E. Jones.

Officers of Prairie County (County Seat, Terry):

County Attorney, W. G. Armstrong, Esq.

Clerk of District Court, C. R. Marks.

Sheriff, W. A. Johnson.

†SEVENTEENTH JUDICIAL DISTRICT.

Counties of Phillips, Valley and Sheridan.

††District Judge: Hon. Frank N. Utter.

Officers of Phillips County (County Seat, Malta):

County Attorney, D. H. McGrath.

Clerk of District Court, C. M. Porter.

Sheriff, Allen Shaw.

Officers of Valley County (County Seat, Glasgow):

County Attorney, Geo. W. Ruffcorn, Esq.

Clerk of District Court, Walter Shanley.

Sheriff, C. W. Powell.

Officers of Sheridan County (County Seat, Plentywood):

County Attorney, Paul Babcock, Esq.

Clerk of District Court, L. J. Onstad.

Sheriff, J. B. Duggan.

*Created by Act approved March 1, 1915 (Laws of 1915, Chap. 50, p. 73).

**Appointed March 11, 1915.

†Created by Act of Fourteenth Legislative Assembly, approved March 10, 1915 (Laws of 1915, Chap. 144, p. 358).

††Appointed March 10, 1915.

TABLE OF CASES REPORTED—VOL. 50.

Adams v. Stenehjelm	232
Alexander, Admr., v. Great Northern Ry. Co.	591
Anderson, Columbus State Bank v.	442
Armstrong, Jones v.	168
Averill Machinery Co. v. Bain	512
 Bailey, In re	 365
Bain, Averill Machinery Co. v.	512
Ball Ranch Co. v. Hendrickson	220
Bardsen, McLaughlin v.	177
Barnard Realty Co. v. City of Butte	159
Beller v. Le Boeuf	192
Board of Commissioners, State (ex rel. Darling) v.	434
Board of Commissioners, State (ex rel. Spaulding) v.	594
Bradley, In re	354
Brice v. Brice	388
Brundy v. Canby	454
Busbee v. Gagnon Co.	203
Butler, County Clerk, State (ex rel. O'Keefe) v.	596
Butte Miners' Union No. 1, Fadden v.	104
 Canby, Brundy v.	 454
Chenoweth v. Great Northern Ry. Co.	481
Chicago, M. & St. P. Ry. Co., Lyon v.	532
City of Butte, Barnard Realty Co. v.	159
City of Butte v. Montana Independent Telephone Co.	574
City of Butte v. Montana Independent Telephone Co.	598
City of Missoula, Kohn v.	75
Coleman, Kersten v.	82
Columbus State Bank v. Anderson	442
Comerford v. James Kennedy Construction Co.	196
County of Lincoln, Johnson v.	253
Crown Butte C. & R. Co., Eder v.	106

Day v. Kelly.....	306
Deschamps v. Loiselle.....	565
District Court, Hamilton v.....	592
District Court, State (ex rel. Carroll) v.....	428
District Court, State (ex rel. Carroll) v.....	506
District Court, State (ex rel. Carroll) v.....	510
District Court, State (ex rel. Carroll) v.....	597
District Court, State (ex rel. Dowen) v.....	249
District Court, State (ex rel. First T. & S. Bank) v.....	259
District Court, State (ex rel. Jones) v.....	1
District Court, State (ex rel. Marshall) v.....	289
District Court, State (ex rel. Pilot Butte Min. Co.) v.....	585
District Court, State (ex rel. Riley) v.....	596
District Court, State (ex rel. Smotherman) v.....	119
District Court, State (ex rel. Smith) v.....	134
District Court, State (ex rel. Sprinkle) v.....	593
District Court, State (ex rel. Working) v.....	435
District Court, State (ex rel. Working) v.....	441
Dolenty, Reed v.....	591
Doornbos v. Thomas.....	370
Eder v. Crown Butte C. & R. Co.....	106
Edwards, Stritzel-Spaberg Lumber Co. v.....	49
Fadden v. Butte Miners' Union No. 1.....	104
Fuller, County Treasurer, State (ex rel. Bank) v.....	599
Gagnon Co., Busbee v.....	203
Gallatin County v. United States F. & G. Co.....	55
Great Northern Ry. Co., Alexander, Admr., v.....	591
Great Northern Ry. Co., Chenoweth v.....	481
Great Northern Ry. Co., Mullery v.....	408
Greenwood, Halverson v.....	597
Gruelle v. J. I. Case Threshing Machine Co.....	214
Halverson v. Greenwood.....	597
Hamilton v. District Court.....	592
Hansen, Jenderson v.....	216

Harley v. Williams.....	142
Hendrickson, Ball Ranch Co. v.....	220
Holden v. Kalispell Athletic Assn.....	598
Iman & Son, Missoula T. & S. Bank v.....	355
In re Bailey.....	365
In re Bradley.....	354
In re McDonald.....	348
In re Mettler.....	299
In re Sutton.....	88
In re Williams' Estate.....	142
James Kennedy Construction Co., Comerford v.....	196
Jenderson v. Hansen.....	216
J. I. Case Threshing Machine Co., Gruelle v.....	214
Johnson v. County of Lincoln.....	253
Johnson, Williams, Receiver, v.....	7
Joki v. Northwestern Improvement Co.....	595
Jones v. Armstrong.....	168
Kalispell Athletic Assn., Holden v.....	598
Keating, State Auditor, State (ex rel. Heyfron) v.....	595
Keffler v. Wilds.....	381
Keffler v. Wilds.....	387
Kelly, Day v.....	306
Kersten v. Coleman.....	82
Kinsman v. Stanhope.....	41
Kohn v. City of Missoula.....	75
Le Boeuf, Beller v.....	192
Leet, Panchot v.....	314
Lemmer v. The "Tribune".....	559
Lentz, State (ex rel. Patterson) v.....	322
Linn, Morrison v.....	396
Loiselle, Deschamps v.....	565
Lynch v. Wylie Permanent Camping Co.....	594
Lyon v. Chicago, M. & St. P. Ry. Co.....	532

Mackel v. Mackel.....	593
McDonald, In re.....	348
McLaughlin v. Bardsen.....	177
Mettler, In re.....	299
Milwaukee Land Co. v. Ruesink.....	489
Missoula T. & S. Bank v. Iman & Son.....	355
Montana Independent Telephone Co., City of Butte v.....	574
Montana Independent Telephone Co. v. City of Butte.....	598
Montana, Wyo. & S. W. Ry. Co., Nixon v.....	95
Morrison v. Linn.....	396
Mullery v. Great Northern Ry. Co.....	408
Murray Hospital, Steiman v.....	555
Murray, Rood v.....	240
Nelson v. Northern Pacific Ry. Co.....	516
Nixon v. Montana, Wyo. & S. W. Ry. Co.....	95
North, Suburban Homes Co. v.....	108
Northern Pacific Ry. Co., Nelson v.....	516
Northern Pacific Ry. Co., Smith v.....	539
Northern Pacific Ry. Co., Stevens v.....	554
Northern Pacific Ry. Co., Wall v.....	122
Northwestern Improvement Co., Joki v.....	595
Panchot v. Leet.....	314
Reed v. Dolenty.....	591
Rood v. Murray.....	240
Ruesink, Milwaukee Land Co. v.....	489
Shoemaker & Co., Waite v.....	264
Smith v. Northern Pacific Ry. Co.....	539
Soy v. Yen.....	592
Sprinkle, Wherry v.....	191
Stanhope, Kinsman v.....	41
State (ex rel. Akin) v. Williams, Justice of the Peace.....	582
State (ex rel. Carroll) v. District Court.....	428
State (ex rel. Carroll) v. District Court.....	506

State (ex rel. Carroll) v. District Court.....	510
State (ex rel. Carroll) v. District Court.....	597
State (ex rel. Darling) v. Board of Commissioners.....	434
State (ex rel. Dowen) v. District Court.....	249
State (ex rel. First T. & S. Bank) v. District Court.....	259
State (ex rel. Gibson) v. Stewart.....	404
State (ex rel. Heyfron) v. Keating, State Auditor.....	595
State (ex rel. Jones) v. District Court.....	1
State (ex rel. Klick) v. Wittmer.....	22
State (ex rel. Marshall) v. District Court.....	289
State (ex rel. O'Keefe) v. Butler, County Clerk.....	596
State (ex rel. Patterson) v. Lentz.....	322
State (ex rel. Pilot Butte Min. Co.) v. District Court.....	585
State (ex rel. Riley) v. District Court.....	596
State (ex rel. Security Bank) v. Fuller, County Treasurer.	599
State (ex rel. Smith) v. District Court.....	134
State (ex rel. Smotherman) v. District Court.....	119
State (ex rel. Spaulding) v. Board of Commissioners.....	594
State (ex rel. Sprinkle) v. District Court.....	593
State (ex rel. Working) v. District Court.....	435
State (ex rel. Working) v. District Court.....	441
State v. Vinn.....	27
Steiman v. Murray Hospital.....	555
Stenehjelm, Adams v.....	232
Stevens v. Northern Pacific Ry. Co.....	554
Stewart, State (ex rel. Gibson) v.....	404
St. John, Taintor v.....	358
Stritzel-Spaberg Lumber Co. v. Edwards.....	49
Suburban Homes Co. v. North.....	108
Sutton, In re.....	88
Taintor v. St. John.....	358
The "Tribune," Lemmer v.....	559
Thomas, Doornbos v.....	370
Tyler v. Tyler.....	65
United States F. & G. Co., Gallatin County v.....	55

Vinn, State v.....	27
Waite v. Shoemaker & Co.....	264
Wall v. Northern Pacific Ry. Co.....	122
Wherry v. Sprinkle.....	191
Wilds, Keffler v.....	381
Wilds v. Keffler.....	387
Williams' Estate, In re.....	142
Williams, Harley v.....	142
Williams, Justice of the Peace, State (ex rel. Akin) v.....	582
Williams, Receiver, v. Johnson.....	7
Wittmer, State (ex rel. Klick) v.....	22
Wylie Permanent Camping Co., Lynch v.....	594
Yen, Soy v.....	592

TABLE OF CASES CITED—VOL. 50.

(For Cases Cited from the Montana Reports, see Table at End of This Volume.)

Abbey v. Christy, 49 Barb. (N. Y.) 276.....	156
Abercrombie v. Jordan, 8 Q. B. D. 187.....	368
Abraham v. Browder, 114 Ala. 287.....	379
Ada County v. Ellis, 5 Idaho, 333.....	64
Adams v. Lockwood, 30 Kan. 373.....	438
Adams v. Spokane Drug Co., 57 Fed. 888.....	18
Adsit v. Board etc., 84 Mich. 420.....	346
Alderman v. State, 24 Neb. 97.....	36
Allen v. Mansfield, 108 Mo. 343.....	402
Amundson v. Wilson, 11 N. D. 193.....	239
Arthur v. Craig, 48 Iowa, 264.....	93, 94
Athol Music Hall v. Corey, 116 Mass. 471.....	571
Atlanta v. Wright, 119 Ga. 207.....	295
Attorney General v. Council, 112 Mich. 145.....	24
Bain v. Northern Pac. Ry. Co., 120 Wis. 412.....	423
Bain v. State, 61 Ala. 75.....	37
Balbach v. Frelinghuysen, 15 Fed. 675.....	18
Banks v. McQuatters (Tex. Civ. App.), 57 S. W. 334.....	116
Bank v. Risley, 6 Hill (N. Y.), 375.....	368
Barrett v. Barrett, 41 N. J. Eq. 139.....	393
Barrett v. Wagner, 105 Minn. 118.....	220
Batchelder v. Moore, 42 Cal. 412.....	302
Bauman v. Bauman, 18 Ark. 320.....	393
Baxter v. Louisville etc. R. Co., 165 Ill. 78.....	129
Beal v. Ray, 17 Ind. 554.....	346
Beeman v. Puget S. T. Co., 79 Wash. 137.....	537
Bell v. Town of Clarion, 113 Iowa, 126.....	538
Belmont v. Erie Ry. Co., 52 Barb. 637.....	438
Benedict v. Potts, 88 Md. 52.....	537
Bennett v. Long Island R. Co., 181 N. Y. 431.....	554
Berry v. McCullough, 94 Ky. 247.....	346
Beverly v. Burke, 9 Ga. 440.....	402
Bibb v. Reid, 3 Ala. 88.....	416
Biencourt v. Parker, 27 Tex. 558.....	26
Bioren v. Nealer, 77 N. J. Eq. 560.....	154
Blackburn v. Hays, 44 Tenn. 227.....	416
Board etc. v. Van Slyck, 52 Kan. 622.....	64
Board v. Wayne Circuit Judges, 172 Mich. 430.....	342
Bomar v. Louisville N. R. Co., 42 La. Ann. 983, 1206.....	313
Bond v. Wilson, 129 N. C. 325.....	117
Boone v. Templeman, 158 Cal. 290.....	117, 118, 505
Bosley v. Baltimore & O. R. Co., 54 W. Va. 563.....	132
Bostwick v. McEvoy, 62 Cal. 496.....	74
Brinckerhoff v. Remsen, 8 Paige (N. Y.), 487.....	154, 156
Bryan v. Harrison, 76 N. E. 316.....	416
Bryant's Estate, 163 App. Div. 890.....	156
Buckminster v. Buckminster, 38 Vt. 248.....	393
Burgess v. Helm, 24 Nev. 242.....	277
Caha v. United States, 152 U. S. 211.....	256
Carlisle v. United States, 16 Wall. 147.....	99

Carlson v. Carlson, 49 Minn. 555.....	438
Carmody's Estate, 88 Cal. 616.....	468
Carpenter v. Coles, 75 Minn. 9.....	402, 403
Carskaddon v. Mills, 5 Ind. App. 22.....	190
Caruthers v. Corbin, 38 Ga. 75.....	239
Cassidy v. Old Colony R. Co., 141 Mass. 174.....	551 <i>et seq.</i>
Catlett v. St. Louis etc. Ry. Co., 57 Ark. 461.....	103
Chattanooga Nat. B. & L. Assn. v. Denson, 189 U. S. 408.....	384
Chemical Nat. Bk. v. Hartford Deposit Co., 161 U. S. 1.....	262
Chicago etc. Ry. Co. v. Smith, 111 Ill. 363.....	550, 554
Cigaran's Estate, 150 Cal. 682.....	468
City W. P. Co. v. City of Fergus Falls, 115 Minn. 33.....	538
Clearwater Timber Co. v. Shoshone County, 155 Fed. 612.....	257
Clein v. Wandschneider, 14 Wash. 257.....	438
Clemens v. St. Louis etc. R. Co., 35 Okl. 667.....	313
Cleve v. Chicago B. & L. Ry. Co., 15 Ann. Cas. 33.....	131
Cleveland etc. Ry. Co. v. Hadley, 16 Ann. Cas. 1.....	488
Cogel v. Knisely, 89 Ill. 598.....	176
Cogwell v. Rockingham etc. Bank, 59 N. H. 43.....	19
Coleman v. Stalnacke, 15 S. D. 242.....	116
Collins v. Chicago etc. Ry. Co., 150 Wis. 305.....	425
Colton v. Drovers' etc. Assn., 90 Md. 85.....	17
Commercial Bank v. Sherman, 28 Or. 573.....	385
Commonwealth v. Smith, 132 Mass. 289.....	346
Conlan v. Sullivan, 110 Cal. 624.....	117
Connally v. Woods, 39 Okl. 186.....	190
Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.....	385
Cosmos Exploration Co. v. Gray Eagle Oil Co., 190 U. S. 301.....	256
Cotton v. Phillips, 56 N. H. 220.....	25, 26
County of Sonoma v. Hall, 132 Cal. 589.....	61, 63
Craig v. Brown, Pet. C. C. 352.....	237
Cronan v. District Court, 15 Idaho, 184.....	293
Crowder v. Doe, 162 Ala. 151.....	402
Darnell v. Buzby, 50 N. J. Eq. 725.....	157
Davis v. Clark, 58 Kan. 100.....	73
Davis v. Davis, 24 S. D. 474.....	238
Davis v. Industrial Mfg. Co., 114 N. C. 321.....	18
Delaware etc. C. Co. v. Mahlenbrock, 63 N. J. L. 281.....	385
Dent v. West Virginia, 129 U. S. 114.....	297
De Tarr v. Heine Brewing Co., 62 Kan. 188.....	190
Dishon v. Smith, 10 Iowa, 212.....	346
Downer v. Smith, 32 Vt. 1.....	278
Durfee v. Abbott, 61 Mich. 471.....	38
Eaton v. Schneider, 185 Ill. 508.....	118
Edenboro Academy v. Robinson, 37 Pa. St. 210.....	571
Edmonson v. Davis, 4 Esp. 14.....	369
Edwards v. Commonwealth, 78 Va. 39.....	92
Elkinton v. Brick, 44 N. J. Eq. 154.....	155
Empire Dairy Feed Co. v. Chatham N. Bank, 52 N. Y. Supp. 387....	46
Equitable L. & Ins. Assn. v. Peed (Ind.), 52 N. E. 201.....	384
Estate of Leonard, 95 Mich. 295.....	433
Estate of Seaman, 146 Cal. 455.....	154
Ex parte Frazer, 54 Cal. 94.....	297
Ex parte Gerino, 143 Ga. 412.....	297
Ex parte Marks, 64 Cal. 29.....	93
Ex parte Shortridge, 5 Cal. App. 371.....	304
Ex parte Spencer, 83 Cal. 460.....	393

Fall v. Eastin, 215 U. S. 1.....	238
Farmers' Dep. N. Bank v. Penn. Bank, 123 Pa. 283.....	17
Farrior v. New England M. S. Co., 88 Ala. 275.....	384
Fisk v. Hicks, 29 S. D. 399.....	424
Flagg v. Teneick, 29 N. J. L. 25.....	72
Florsheim Bros. v. Lester, 60 Ark. 120.....	385
Foley's Will, 76 Misc. Rep. 168.....	154
Fort v. McCully, 59 Barb. (N. Y.) 87.....	18
France v. State, 57 Ohio St. 1.....	297
Freiberg v. Railway Co., 77 N. E. 920.....	417
Fuller v. Hollis, 57 Ala. 435.....	72
Fuller v. State, 122 Ala. 32.....	93, 94
Gates Iron Works v. Cohen, 7 Colo. App. 341.....	385
Gatta v. P. B. & W. Ry. Co., 2 Boyce (Del.), 356.....	423
Gaughen v. Kerr, 99 Iowa, 214.....	118
Gibson v. International T. Co., 177 Mass. 100.....	538
Gifford v. Workman, 15 Iowa, 34.....	87
Gilbert v. Knox, 52 N. Y. 125.....	154, 155
Gillespie v. B. R. & P. Co., 226 Pa. 31.....	551
Glasscock v. Glasscock, 94 Ind. 163.....	393
Glass v. Hampton (Ky.), 122 S. W. 803.....	117
Glide v. Superior Court, 147 Cal. 21.....	293
Goodpaster v. Leathers, 123 Ind. 121.....	74
Gove v. Island City M. & M. Co., 19 Or. 363.....	277
Graves v. Thomas, 95 Ind. 361.....	190
Gray v. Nellis, 6 How. Pr. 290.....	564
Great N. Ry. Co. v. Thompson, 199 Fed. 395.....	425
Greenleaf v. Dubuque etc. Ry. Co., 30 Iowa, 301.....	38
Griffin v. Manice, 166 N. Y. 188.....	538
Grigg v. Landis, 21 N. J. Eq. 494.....	117
Guthrie v. Holt, 9 Baxt. (Tenn.) 527.....	117
Hade v. McVay, 31 Ohio St. 231.....	18
Hall v. Lauderdale, 46 N. Y. 70.....	246
Hall v. Law, 102 U. S. 461.....	402
Harmon v. Williams, 34 N. J. Eq. 255.....	19
Hargrave v. Vaughan, 82 Tex. 347.....	416, 417
Harris v. Brown, 93 N. Y. 390.....	438
Harris v. Zanone, 93 Cal. 59.....	564
Havemeyer v. Superior Court, 84 Cal. 327.....	293
Hawkins v. Graham, 149 Mass. 284.....	287
Hayes v. Candee, 75 Conn. 131.....	433
Hayward v. Leonard, 7 Pick. (Mass.) 181.....	277
Hazeltine v. Mississippi etc. Co., 55 Fed. 743.....	385
Hedrick v. Hughes, 15 Wall. 123.....	39
Henry v. Simanton, 64 N. J. Eq. 572.....	393
Herbert v. Wagg, 27 Okl. 674.....	279
Herring & Bird v. Pollard's Exrs., 4 Humph. (Tenn.) 362.....	117
Hileman v. Chicago etc. Ry. Co., 113 Iowa, 591.....	551
Hindley v. Manhattan Ry. Co., 185 N. Y. 335.....	402
Hitchcock v. McElrath, 69 Cal. 634.....	438
Hitchler's Will, 25 Misc. Rep. (N. Y.) 365.....	156
Hodgson v. Dexter, 1 Cranch, 345.....	246
Hogan v. St. Louis, 176 Mo. 149.....	385
Hogsett v. Traction Co., 55 Tex. Civ. 72.....	417
Houser & Haines Mfg. Co. v. McKay, 53 Wash. 337.....	379
Houts v. Union Pac. Ry. Co., 33 Utah, 175.....	129

Howard v. Sexton, 4 N. Y. 157.....	564
Hutchinson v. Bours, 13 Cal. 50.....	4
Illinois C. R. R. v. Anderson, 73 Ill. App. 621.....	551 <i>et seq.</i>
In re Beckett, 103 N. Y. 167.....	155
In re Daniels, 140 Cal. 335.....	433
In re Duncan, 83 S. C. 186.....	367
In re Ingram's Estate, 78 Cal. 586.....	468
In re Ross, 140 U. S. 453.....	94
In re Simmons, 15 Q. B. D. 348.....	368
In re Walker, 110 Cal. 387.....	154
In re Weber, 4 N. D. 119.....	239
International Q. Co. v. Union Cattle Co., 3 Wyo. 803.....	514
In the Matter of Convicts, 73 Vt. 414.....	93, 94
Jack v. Klepser, 196 Pa. 187.....	18
Jack & Toner v. Des Moines etc. R. Co., 53 Iowa, 399....	379
Jackson v. Natchez, 114 La. 981.....	314
Jaliffe v. Northern Pac. Ry. Co., 52 Wash. 433.....	131
Jasperson v. Scharnikow, 15 L. R. A. (n. s.) 1218.....	402
John Deere Plow Co. v. Wyland, 69 Kan. 255.....	384
Johnson v. New York etc. R. R. Co., 111 Me. 263.....	132
Jones v. Gridley, 20 Kan. 584.....	346
Jones v. Piening, 85 Wis. 264.....	18
Joy v. National Exch. Bank, 32 Tex. Civ. App. 398.....	176
Katz v. Bedford, 77 Cal. 319.....	277
Keefe v. District Court, 16 Wyo. 381.....	293
Keefe's Will, 155 App. Div. 575.....	154
Kelley v. Boettcher, 85 Fed. 55.....	474
Kennedy's Case, 135 Mass. 48.....	94
Kenney v. Kelleher, 63 Cal. 442.....	438
Keyes v. Meyers, 147 Cal. 702.....	72
Kimble v. Stackpole, 60 Wash. 35.....	314
King v. Trelawney, 3 Burr. 1616.....	26
King v. Wilson, 6 Beav. 126.....	118
Kirby v. Harrison, 2 Ohio St. 326.....	118
Kotz v. Illinois C. R. R. E., 188 Ill. 578.....	551
Kreling v. Kreling, 118 Cal. 421.....	263
Leavenworth etc. Ry. Co. v. Forbes, 37 Kan. 445.....	229
Leavenworth etc. Co. v. Waller, 65 Kan. 514.....	313
Levels v. St. Louis etc. Ry. Co., 196 Mo. 606.....	39
Levyn v. Koppin (Mich.), 149 N. W. 993.....	417
Lorbeer v. Hutchinson, 111 Cal. 272.....	252
Louisville N. R. R. Co. v. Hall, 87 Ala. 708.....	313
Louisville etc. R. Co. v. Seomp, 124 Ky. 330.....	551
Ludwig's Estate, 79 Minn. 101.....	154
Luebke v. Chicago etc. Ry. Co., 59 Wis. 127.....	423
Luitweiler P. E. Co. v. Ukiah W. & I. Co., 16 Cal. App. 198.....	379, 380
Lux v. Haggin, 69 Cal. 255.....	474
Lynch v. Ninemire Packing Co., 63 Wash. 425.....	538
Maffett v. Oregon etc. R. Co., 46 Or. 443.....	118
Magie v. Stoddard, 25 Conn. 565.....	25, 26
Maguire v. Fitchburg Railroad, 146 Mass. 379.....	423
Mann v. Darden, 171 Ala. 142.....	26
Marsh v. Lott, 156 Cal. 643.....	474

Mayor etc. v. State, 15 Md. 376.....	252
McCagg v. Woodman, 28 Ill. 84.....	18
McClaine v. Rankin, 197 U. S. 154.....	64
McCroskey v. Ladd, 96 Cal. 455.....	118
McDonald v. Montgomery St. Ry. Co., 110 Ala. 161.....	314
McDonnell v. Alabama G. L. Ins. Co., 85 Ala. 401.....	47
McLaughlin v. Carter, 13 Tex. Civ. 694.....	417
Metcalf Co. v. Gilbert, 19 Wyo. 331.....	277
Miller v. Receivers, 1 Paige, 444.....	18
Mo v. Bettner, 68 Minn. 179.....	118
Moffatt v. Corning, 14 Colo. 104.....	514
Moon v. Salt Lake County, 27 Utah, 435.....	548
Moor v. Giesecke, 76 Tex. 543.....	115, 116
Morrissey v. Blasky, 134 N. W. 319.....	585
Morrow v. Sweeney, 10 Ind. App. 626.....	190
Missouri Pac. Ry. Co. v. Harris, 67 Tex. 166.....	129
Multnomah County v. Kelly, 37 Or. 1.....	64
Mundt v. Simpkins, 81 Neb. 1.....	278, 379
Murray v. Superior Court, 129 Cal. 628.....	263
Nelson v. Chicago B. & Q. Ry. Co., 78 Neb. 57.....	132
New Orleans v. Steamship Co., 20 Wall. 387.....	305
Nielson v. Northern Pac. Ry. Co., 184 Fed. 601.....	548
Nigro's Estate, 149 Cal. 702.....	468
Northern Pac. Ry. Co. v. Townsend, 190 U. S. 267.....	548
Northern Pac. Ry. Co. v. Wadekamper, 126 Pac. 909.....	548
Northwestern L. Ins. Co. v. Stevens, 71 Fed. 258.....	237
Northwestern Tel. Exch. Co. v. Minneapolis, 81 Minn. 140.....	581
Oakland S. M. Co. v. Wolf Co., 118 Fed. 239.....	385
Osborn v. Byrne, 43 Conn. 155.....	18, 19
Osborne & Co. v. Poindexter (Tex. Civ. App.), 34 S. W. 299.....	379, 380
Osborn v. United States, 91 U. S. 474.....	92
Overend v. Superior Court, 131 Cal. 280.....	303
Overhiner v. State, 156 Ind. 187.....	297
Pennsylvania v. Bauerle, 143 Ill. 459.....	384
Penso v. McCormick, 125 Ind. 116.....	190
People v. Bush, 40 Cal. 344.....	252
People v. Cal. Safe Dep. & T. Co., 168 Cal. 241.....	17
People v. Camp, 139 N. Y. 87.....	352
People v. Carrington, 5 Utah, 531.....	293
People v. Commissioners, 76 Hun, 146.....	25
People v. Court, 30 Colo. 123.....	293
People v. Cowles, 13 N. Y. 350.....	346
People v. District Court, 26 Colo. 386.....	293
People v. Erbaugh, 42 Colo. 480.....	369
People v. Hanifan, 96 Ill. 420.....	26
People v. Hardy, 8 Utah, 68.....	342
People v. Kerwin, 10 Colo. App. 472.....	346
People v. Mathewson, 47 Cal. 442.....	342
People v. Mayne, 118 Cal. 516.....	38
People v. Mechanics' & T. S. Inst., 92 N. Y. 7.....	20
People v. Putnam, 52 Colo. 517.....	64
People v. Ratz, 115 Cal. 132.....	37, 38
People v. Thompson, 67 Cal. 627.....	346
People v. Van Ness, 76 Cal. 121.....	62
People v. Weller, 11 Cal. 49.....	346

People ex rel. Dunham v. Morgan, 90 Ill. 558.....	252
People ex rel. Snyder v. Hylan, 212 N. Y. 236.....	337
Phillip v. Gallant, 62 N. Y. 256.....	278, 285
Pier v. Lee, 14 S. D. 600.....	119
Polk v. Johnson (Ind. App.), 76 N. E. 634.....	263
Pollard v. Lyon, 1 MacArth. 296.....	564
Pooler v. Reed, 73 Me. 129.....	26
Presnall v. Raley (Tex. Civ. App.), 27 S. W. 200.....	228
Pugh v. Oregon Imp. Co., 14 Wash. 331.....	314
Queen of the Pacific, 180 U. S. 49.....	127
Ramming v. Caldwell, 43 Ill. App. 175.....	176
Rauch v. Chapman, 16 Wash. 568.....	318
Reassignment of Hamilton, 26 Or. 579.....	18
Receivers of People's Bank v. Patterson G. L. Co., 23 N. J. L. 283....	17
Reed v. Watson, 27 Ind. 443.....	154
Richardson v. Orth, 40 Or. 252.....	154
Riggs v. Purcell, 74 N. Y. 370.....	438
Robinson v. Aird, 43 Fla. 30.....	20
Rodwell v. Rowland, 137 N. C. 617.....	346
Rogers v. Armstrong Co. (Tex. Civ.), 30 S. W. 848.....	417
Rosenblatt v. Johnston, 104 U. S. 462.....	262
Rundell v. Butler, 7 Barb. 260.....	564
Rutter v. Henry, 46 Ohio St. 272.....	229
Ryus v. Gruble, 31 Kan. 767.....	61, 64
Salladin v. Mitchell, 42 Neb. 859.....	18
San Antonio etc. Ry. Co. v. Morgan, 92 Tex. 98.....	102
San Joaquin L. & W. Co. v. Beacher, 101 Cal. 70.....	571
Sargent v. Herrick, 221 U. S. 404.....	257
Savings Bank v. Ward, 100 U. S. 195.....	367
Schmidt v. Chicago etc. Ry. Co., 83 Ill. 405.....	416
Scott v. Armstrong, 146 U. S. 499.....	17
Scott v. State, 6 Tex. Civ. App. 343.....	92, 93
Seaboard Air-line v. Horton, 233 U. S. 492.....	531
Seanor v. McLaughlin, 160 Pa. St. 150.....	514, 515
Sell v. Mississippi R. L. Co., 88 Wis. 581.....	279
Shepard v. Mills, 173 Ill. 223.....	277
Sigel Campion L. S. Co. v. Haston, 68 Kan. 749.....	384
Sinclair v. Tallmadge, 35 Barb. (N. Y.) 602.....	278
Sjoli v. Dreshel, 199 U. S. 564.....	257
Smiley v. Smiley, 114 Ind. 258.....	73
Smith v. Brackett, 69 Conn. 492.....	237
Smith v. Brady, 17 N. Y. 173.....	277
Smith v. State, 65 Wis. 453.....	353
Snodgrass v. Hunt, 15 Ind. 274.....	416
Sodowsky v. McGee, 4 J. J. Marsh. 267.....	416
Sparrow v. Kohn, 109 Pa. 359.....	385
Spaulding v. Chicago etc. Ry. Co., 33 Wis. 582.....	537
Spokane County v. Prescott, 19 Wash. 418.....	64
Stacey v. Stephens, 78 Minn. 480.....	438
State v. Aloe, 152 Mo. 466.....	293
State v. Anderson, 155 Iowa, 271.....	25
State v. Brinkerhoff, 66 Tex. 45.....	26
State v. Brobston, 94 Ga. 95.....	18
State v. Buttz, 9 S. C. 156.....	25
State v. Collins, 2 Nev. 351.....	342
State v. Conway, 18 Ohio, 234.....	61, 64

State v. Davis, 42 Or. 34.....	61, 63
State v. Denton, 128 Mo. App. 304.....	293
State v. Doherty, 16 Wash. 382.....	346
State v. Goff, 15 R. I. 505.....	25, 26
State v. Hilton, 80 N. J. L. 528.....	25
State v. Itaska L. Co., 100 Minn. 355.....	257
State v. Jones, 130 Wis. 572.....	24
State v. Kelly, 32 Ohio St. 421.....	61
State v. Lansing, 46 Neb. 514.....	346
State v. McKinney, 31 Kan. 570.....	36
State v. Orvis, 20 Wis. 235.....	346
State v. Page, 60 Kan. 664.....	92
State v. Peters, 43 Ohio St. 629.....	93
State v. Richardson, 125 La. 645.....	369
State v. Skirving, 19 Neb. 497.....	346
State v. State Board, 7 Wyo. 478.....	407
State v. Stewart, 47 La. Ann. 410.....	36
State v. Taylor, 12 Ohio St. 130.....	25
State v. Thayer, 31 Neb. 82.....	346
State v. Thompson, 122 N. C. 493.....	25, 26
State v. Wolfer, 53 Minn. 135.....	94
State ex rel. v. Gilmore, 20 Kan. 551.....	139
Steelman v. Atchley, 98 Ark. 294.....	18
Stephenson v. Ferguson, 4 Ind. App. 230.....	228
Stethem v. Skinner, 11 Idaho, 374.....	407
Stillwell etc. Mfg. Co. v. Phelps, 130 U. S. 520.....	277
Stockton v Mechanics' etc. Bk., 32 N. J. Eq. 163.....	19
Stone v. Segur, 11 Allen, 568.....	416
Stubbs v. Lee, 64 Me. 195.....	26
Stutzner v. Printz, 43 Neb. 306.....	438
Snydam v. Morris C. & B. Co., 6 Hill (N. Y.), 217.....	385
Sweetland v. Tramborg, 176 Fed. 641.....	469
Tabor v. Goss & Phillips Mfg. Co., 11 Colo. 419.....	385
Taylor v. Commonwealth, 3 J. J. Marsh. (Ky.) 401.....	252
Terrill v. Superior Court, 6 Cal. Unrep. 398.....	293
Thompson v. Union Trust Co., 130 Mich. 508.....	18
Tiller & Smith v. Chicago B. & R. Ry. Co. (Iowa), 112 N. W. 631....	133
Tourtlot v. Whithed, 9 N. D. 467.....	18
Trigg v. Conway, Hempst. 538.....	237
Trowbridge v. Barrett, 30 Wis. 661.....	277
Underwood v. Western etc. R. R. Co., 105 Ga. 48.....	103
United States v. Axman, 152 Fed. 816.....	64
United States v. Denver etc. R. Co., 150 U. S. 1.....	549
United States v. Nagle, 17 Blatchf. 258.....	36
United States v. Wilson, 7 Pet. 150.....	94
Van Orsdall v. Hazard, 3 Hill (N. Y.), 243.....	26
Walker v. McMurchie, 61 Wash. 489.....	119
Walker v. Tribune Co., 29 Fed. 827.....	564
Walsh v. Jenvey, 85 Md. 240.....	278
Walton v. United States, 9 Wheat. (U. S.) 651.....	61
Ware v. State, 74 Ind. 181.....	64
Warren v. Bowdran, 156 Mass. 280.....	402
Weingartner v. Louisville etc. R. Co., 19 Ky. Law Rep. 1023.....	314
Wendorff v. Dill, 83 Kan. 782.....	340
Western Union Tel. Co. v. Polhemus, 178 Fed. 904.....	551

Weybrich v. Harris, 31 Kan. 92.....	379
Wheelright v. Wheelright, 2 Mass. 446.....	74
White v. Chicago etc. R. Co., 122 Ind. 317.....	551
Wilkins v. State, 113 Ind. 514.....	297
William E. Moses, 33 L. D. 333.....	257
Wilson v. Atchison etc. R. R. Co., 66 Kan. 183.....	103
Wilson v. Moriarity, 77 Cal. 596.....	478
Wisconsin C. R. R. Co. v. Price County, 133 U. S. 496.....	255
Wolf v. Perryman, 17 S. W. 772.....	416
Woodward v. Fuller, 80 N. Y. 312.....	277, 278
Wooley v. Wooley, 95 N. Y. 231.....	157
Worth v. McConnell, 42 Mich. 473.....	175
Wyman v. Bowman, 127 Fed. 257.....	474
Yardley v. Clothier, 49 Fed. 337.....	17

SUPREME COURT RULES.

**For Rules of the Supreme Court of the State of Montana, see
44 Mont. xxv.**

(xxix)



ERRATA.

On page 28, line 1 of paragraph 9 of syllabus, read "question" for "questions."

(xxxi).

CASES DETERMINED
IN THE
SUPREME COURT

AT THE
OCTOBER TERM, 1914.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY,
THE HON. SYDNEY SANNER, } Associate Justices.

STATE EX REL. JONES, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 3,554.)

(Submitted October 5, 1914. Decided November 21, 1914.)

[144 Pac. 564.]

Mandamus—Judgment—Entry—Stay—Verdict—Construction.

Judgment—Entry After Verdict—Stay.

1. Under section 6800, Revised Codes, which requires entry of judgment within twenty-four hours after rendition of the verdict, unless the case is reserved for argument or further consideration or a stay of proceedings is granted, neither reservation nor stay can be allowed by the court *ex gratia* or without adequate reason.

[As to *mandamus* to compel entry of judgment by default, see note in Ann. Cas. 1913B, 344.]

Same—Stay After Verdict in Aid of New Trial.

2. In the absence of consent, a stay of proceedings after verdict and before entry of judgment, in aid of a new trial, cannot be had, since a stay for that purpose can be granted only after notice of intention to move for a retrial, and such notice cannot be given until after entry of judgment.

Verdict—Setting Aside—New Trial—Power of District Court.

3. While the district court may refuse to receive a verdict which is informal or insufficient, it cannot set it aside upon substantial grounds

save by granting a new trial, nor grant a new trial except upon motion made in the manner, within the time and upon the grounds specified in the Codes.

Judgment—Entry—Reservation for Argument—Power of Court.

4. *Held*, that a case may, after verdict, be reserved for argument, under section 6800, Revised Codes, only when the judgment does not necessarily follow the verdict, or where, after the discharge of the jury, the verdict is claimed to be unresponsive to the issues, or so ambiguous or informal that no proper judgment can be entered in conformity therewith.

Trial—Verdict—Construction.

5. Under the rules that a verdict is not to be technically construed but must be given such a reasonable construction as will carry out the obvious intention of the jury, and that the law regards that as certain which can be made certain, *held* that a verdict was sufficient to warrant entry of judgment thereon, though its formal appearance lent support to the contention that the jury returned three verdicts.

Mandamus—Controlling Judicial Action—When Rule Does not Apply.

6. *Mandamus* does not lie to control judicial action, but will run to compel the vacation of an order into the making of which judicial discretion could not enter, and which the court had no power to make.

Judgment—Entry *Nunc Pro Tunc*—When.

7. Where the entry of judgment within twenty-four hours after rendition of verdict was prevented by an unauthorized order of the trial judge, the successful party is, upon vacation of such order, entitled to have it entered *nunc pro tunc*.

[As to entry of judgment *nunc pro tunc*, see note in 4 Am. St. Rep. 828.]

Mandamus. Original application by the State, on the relation of Ruth Jones, against the District Court of the Twelfth Judicial District in and for Valley County and Frank N. Utter, a judge thereof. Peremptory writ issued.

Messrs. Norris & Hurd, for Relator; *Mr. Edwin L. Norris* argued the cause orally.

Messrs. Purcell & Horsky and *Mr. John L. Slattery*, for Respondents, submitted a brief; *Mr. Antone J. Horsky* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Mandamus to compel the district court of Valley county and Frank N. Utter, as judge thereof, to vacate an order staying the entry of judgment upon a verdict and to order the entry of such judgment. The uncontroverted facts are as follows: Ruth Jones commenced her action in the above court against W. F. Shannon

and Lila Shannon, seeking damages for wrongfully and maliciously ejecting her from a public hotel conducted by them. Issue was joined and the cause tried to the court sitting with a jury. The verdict was for the plaintiff, and upon its return the court ordered it to be filed, but "ordered further that no judgment be entered, and that the case be reserved for further argument and consideration, and ordered that in the meantime a stay of proceedings be had." This was on July 17, 1914. No judgment has been entered on the verdict, because the clerk is restrained by the order last mentioned, and the court has refused to vacate the same notwithstanding plaintiff's repeated demands.

In his return to the alternative writ, the respondent Judge Utter sets forth that the order complained of is not and was not intended as a final order denying judgment in any event, but was an order authorized by section 6800, Revised Codes, staying the entry of judgment pending reservation of the cause for argument and further consideration; that, upon making the order, the court requested counsel to argue the question whether the court could, on its own motion, set aside the verdict and grant a new trial, which question was argued by counsel on July 20; that at the conclusion of the argument the court requested counsel to present briefs or citations of authority upon said question, but no such briefs or citations have been furnished by either party.

From this return it is perfectly clear that the district court, [1] believing the jury to have wrongly decided the issues, stayed the entry of judgment in an action at law pending the discussion and decision of a proposition which had nothing whatever to do with the form of the verdict, with its responsiveness to the issues, or with its adequacy in any respect to support a judgment; and the question is whether such an order can be properly made for such a purpose. Section 6800, Revised Codes, provides: "When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the

court order the case to be reserved for argument or further consideration, or grant a stay of proceedings."

That the court may, under some circumstances, reserve a case for argument or grant a stay of proceedings is not to be denied; but in view of the fact that the prevailing party is *prima facie* entitled to have judgment entered as directed in the above section (*Consolidated G. & S. Min. Co. v. Struthers*, 41 Mont. 565, 111 Pac. 152), and that a positive duty is thereby imposed upon the clerk from which he is absolved, without recourse by the prevailing party, pending reservation or stay, it must be that neither reservation nor stay can be allowed *ex gratia* or without adequate reason. Generally speaking, this is certainly true of a stay after judgment, for this court so declared in *State ex rel. Robinson v. Clements*, 37 Mont. 96, 127 Am. St. Rep. 701, 94 Pac. 837. A stay before judgment is in reality a more serious matter than a stay after judgment. In this connection a great authority has said: "If there is no doubt as to what judgment is proper, the better practice is to enter it at once. The judgment may as well be set aside as the verdict. Therefore such proceedings as may be appropriate to securing a new trial, or any other right of the losing party, can be prosecuted as advantageously upon granting a stay of proceedings upon the judgment as upon the verdict. The immediate entering of judgment authorizes the making up of the judgment-roll, and thus secures a lien on the judgment debtor's real estate. To this security he is at once justly entitled. If the court delays in granting it to him, he may, during the stay of proceedings, be deprived of the fruits of his litigation." (1 Freeman on Judgments, sec. 42; *Hutchinson v. Bours*, 13 Cal. 50.) To this we may add: The stay complained of was confessedly in aid of a new trial con-[2] templated by the court upon its own motion. A stay in aid of a new trial is properly granted only after notice of intention has been given (Rev. Codes, sec. 6798), and notice of intention cannot be given until after judgment has been entered. (Rev. Codes, sec. 6796.) From this it would seem to follow

—certainly in the absence of consent—that a stay before judgment for such a purpose is a legal impossibility.

Nor, in any proper sense, can it be said that the “case” was reserved for argument or further consideration. The “case” was held up pending the argument of a collateral matter (1 Spelling, New Trial & Appellate Procedure, sec. 14), upon a proposition no more open to question in this state than if it were written in unmistakable language in the Code itself. We [3] say this because it has been repeatedly held by this court that, while the trial court may refuse to receive a verdict which is informal or insufficient, it may not set aside a verdict upon substantial grounds, save by granting a new trial (*Morris v. Burke*, 15 Mont. 214, 38 Pac. 1065; *Harrington v. Butte, A. & Pac. Ry. Co.*, 36 Mont. 478, 93 Pac. 640), nor grant a new trial save upon motion made in the manner, within the time and upon the grounds specified in the Code. (*Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920; *Porter v. Industrial Printing Co.*, 26 Mont. 170, 66 Pac. 839, 67 Pac. 67; *State ex rel. Stromberg-Mullins Co. v. District Court*, 28 Mont. 123, 72 Pac. 412; *Wright v. Matthews*, 28 Mont. 442, 72 Pac. 820; *State ex rel. Walker-ville v. District Court*, 29 Mont. 176, 74 Pac. 414; *Vreeland v. Edens*, 35 Mont. 413, 89 Pac. 735; *Canning v. Fried*, 48 Mont. 560, 139 Pac. 448.) After a careful consideration of the subject, [4] we are satisfied that a case tried by a jury may be reserved for argument, under section 6800 above, only when the judgment does not necessarily follow the verdict, as, for instance, in equity suits, or where, after discharge of the jury, the verdict is claimed to be unresponsive to the issues or so ambiguous or informal that no judgment, proper under the issues, could be entered in conformity with it.

It is argued by counsel for respondents that the jury returned three verdicts; hence it cannot be told what the verdict is, and no judgment can be entered in conformity with it. As indicated [5] above, the trial court did not make this a basis for the order complained of, and we think properly so. In our opinion, there was but one verdict; and while the formal appearance of it jus-

tifies the remarks of counsel, the law regards that as certain which can be made certain. "A verdict is not to be technically construed, but is to be given such a reasonable construction as will carry out the obvious intention of the jury." (*Consolidated G. & S. Min. Co. v. Struthers, supra.*) We find no difficulty in understanding that the jury intended to assess the damages at \$1,000, of which \$500 should be considered as actual damages and \$500 exemplary. Whether any exemplary damages should have been allowed, or whether the verdict as we have construed it is supported by the evidence, is not now the question.

It is also contended by counsel for respondents that, assuming the verdict to be good, the court had the right to reserve the case for argument, and its action in so doing, even if erroneous, cannot be questioned in this proceeding. The rule that [6] *mandamus* will not lie to control judicial action is too well settled for discussion. The trouble here is that, if the conclusions above announced are correct, the order complained of is within a recognized exception which exists if "it appear by necessary legal deduction from the facts stated that the aggrieved party has been denied a right which it was the plain legal duty of the officer to grant, and without his proper discretion to refuse." (*State ex rel. Davis v. District Court*, 30 Mont. 8, 75 Pac. 516.) It was not an order which the judge might make rightly or wrongly according to his best judgment, but one which, under the circumstances returned by him, he had no authority to make at all. It was analogous to the order in *State ex rel. Robinson v. Clements, supra*, which this court held reversible upon *mandamus*.

The relator was entitled to have judgment in conformity with [7] the verdict from the moment it was entered, and she was deprived of this right by the order complained of. Under the rule adopted in *Comanche Min. Co. v. Rumley*, 1 Mont. 201, and since followed (*Territory v. Clayton*, 8 Mont. 1, 14, 19 Pac. 293; *Barber v. Briscoe*, 9 Mont. 341, 345, 23 Pac. 726; *Parrott v. McDevitt*, 14 Mont. 203, 206, 36 Pac. 193), she is entitled to have such judgment entered *nunc pro tunc*.

It is ordered that a peremptory writ issue directing respondents to vacate the order forbidding the entry of judgment in the cause referred to, and to direct the entry of judgment in conformity with the verdict therein as of the date thereof.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY, being absent, did not hear the argument and takes no part in the foregoing decision.

WILLIAMS, RECEIVER, APPELLANT, v. JOHNSON, RESPONDENT.

(No. 3,559.)

(Submitted October 7, 1914. Decided November 21, 1914.)

[144 Pac. 768.]

Banks and Banking—Receivers—Insolvency—Preference—Savings and Commercial Banks—Setoff and Counterclaim—Deposits—Interest.

Banks and Banking—Receivers—Setoff.

1. A receiver of an insolvent commercial bank occupies no higher position relative to the rights of those indebted to it than the bank did before his appointment. He acts as assignee of the insolvent, and as such must, in the collection of its assets, recognize the right of setoff where it exists just as the bank would have been compelled to do had it sought to enforce collection prior to insolvency.

[As to when setoff is maintainable against receivers of insolvent banks, see note in 47 Am. St. Rep. 142.]

Same—Depositors—Debtors—Setoff.

2. In an action by the receiver of an insolvent commercial bank against a depositor to recover on a promissory note, *held* that the latter was entitled to a setoff, by way of counterclaim, to the amount of his deposit at the time the bank suspended, and that such setoff did not give defendant an unlawful preference over the other creditors of the bank.

Same—Savings and Commercial Banks.

3. A bank organized under sections 3923-3944, Revised Codes, with a capital stock, and the profits of which are to be divided among the stockholders is a commercial and not a savings bank, and the fact that it bears the name of "Savings Bank" does not require it to be classed under the head of that class of banks, within the meaning of the statute (Rev. Codes, secs. 3945-3958), providing for their organization and regulation.

Same—Insolvency—Deposits—Setoff—Interest.

4. Since the effect of the suspension and declared insolvency of a bank is to make deposits due and actionable, defendant was entitled to interest on his deposit from the date the receiver took possession (the day of suspension) until the date of the judgment.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by F. D. Williams, as receiver of the State Savings Bank of Butte, against E. T. Johnson. From a judgment for defendant, plaintiff appeals. Affirmed.

Messrs. Kremer, Sanders & Kremer, for Appellant, submitted a brief; *Mr. Louis P. Sanders* argued the cause orally.

In approaching the argument herein, we very frankly confess that the rule laid down in the case of *Mercer v. Dyer*, 15 Mont. 317, 39 Pac. 314, will have much to do with the decision of the court herein. However, the fund involved in the *Mercer Case* was a trust fund—not in the sense that all the funds in the possession of the receiver constitute trust funds, but the fund discussed in that case was a trust fund when deposited in the bank, while no such attribute attaches to either of the deposits of the respondent herein. In the *Mercer Case*, the officers of the bank knew that such deposit was a trust fund, and it needs no citation of cases to sustain the contention that funds originally deposited in a bank as trust funds do not partake of the nature of funds belonging to a general depositor and open to checking account, as is the case herein in so far as the two deposits here are concerned. There are other Montana cases to which we call attention, not particularly because they are enlightening upon any question involved herein, but they are cited merely to bring to the attention of the court such Montana decisions as in any way may be relevant in the discussion to follow. They are *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111; *Yellowstone County v. First Trust & Sav. Bank*, 46 Mont. 439, 128 Pac. 596.

The stipulation of facts discloses that the State Savings Bank, at the time of its suspension, was doing business pursuant to

the law of Montana as found in sections 3923 to 3944 of the Revised Codes of Montana, 1907, and Acts amendatory thereto. A comparison between these sections and those found in Chapter III, entitled "Savings Bank," beginning with section 3945 and ending with section 3958, discloses that the powers under both chapters were comprehensive enough to permit us now to contend that although strictly speaking, the bank was conducting business under Chapter II, it was likewise doing business as a savings institution, and we submit that the apparent distinction, which is found to exist between the usual rule of setoff where the bank is conducting general banking business, and the rule applicable to savings institutions, applies here.

"Ordinarily, a depositor in a savings bank, who is also a debtor to the bank as a borrower of its funds, cannot, upon the insolvency of the bank, set off the amount of his deposit against his indebtedness." (*Osborn v. Byrne*, 43 Conn. 155, 21 Am. Rep. 641; *Barnstable Sav. Bank v. Snow*, 128 Mass. 512.) "Upon the insolvency of a savings bank, a general depositor cannot set off his deposit against a debt due from him to the bank. He is not a creditor. His relation to the assets is like that of a stockholder in a bank of discount." (*Cogswell v. Rockingham Ten Cents Sav. Bank*, 59 N. H. 43; *Hall v. Paris*, 59 N. H. 71.) "A depositor in an insolvent savings bank, who also owes it for borrowed money, cannot set off his deposit against such debt, although the deposit consisted of borrowed money." (*Hannon v. Williams*, 34 N. J. Eq. (7 Stew.) 255, 38 Am. Rep. 378.) "Upon the insolvency of a bank, its general creditors must be paid *pro rata*." (*McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911; *Clark v. Chicago Title & Trust Co.*, 186 Ill. 440, 78 Am. St. Rep. 294, 53 L. R. A. 232, 57 N. E. 1061; *Schmeling v. State*, 57 Neb. 562, 78 N. W. 279; *Bank of Blackwell v. Dean*, 9 Okl. 626, 60 Pac. 226; *Willoughby v. Weinberger*, 15 Okl. 226, 79 Pac. 777; *St. Mary's Church of Potsdam v. National Bank of Potsdam*, 23 Misc. Rep. 588, 52 N. Y. Supp. 802.) "Depositors in savings institutions stand in the attitude of partners, and on the insolvency of the institution, become owners

in common of the assets and entitled to share the same after payment of privilege debts in the proportion which their respective amounts bear and the net amount ultimately to be realized." (*Kennedy v. New Orleans Savings Inst.*, 36 La. Ann. 1.) On the facts in this case we submit that neither of the deposits of the respondent are entitled to be offset against his debt to the bank. Respondent should be compelled to pay the amount of the note with interest, and then, in the due course of the administration of the receivership, he should participate ratably with other general creditors in respect to his two deposits.

An examination of the authorities which were followed in the case of *Mercer v. Dyer*, *supra*, and which we are frank to say apparently constitute the weight of authority disclose failure to discuss, so far as we have been able to read them, the inequitable advantage thereunder given to a creditor of an insolvent bank who happens fortuitously to have been a debtor of the bank. Under an application of the rule laid down in the *Mercer Case*, creditors (but not debtors) of a bank share *pro rata* in dividends declared, receiving only a percentage of their deposits if such bank does not pay out in full. On the other hand, creditors (being also debtors) of a bank receive dollar for dollar, thereby enjoying a preference over the former class.

Whatever may be the logic of the cases which permit a setoff, it is impossible to escape from the palpable inequality that is permitted under the doctrine upon which respondent relied and which was adopted by the trial court. It may be the law that he who had been able to borrow shall be preferred over him who has not, but such a doctrine is unfair and should not be sanctioned.

No one will dispute the fact that a liability due from a debtor to an insolvent bank cannot be diminished or changed. It is a fixed debt which must be paid. On the other hand, a deposit in an insolvent bank possesses none of these attributes. If the bank pays out in full, the depositor receives the amount of his deposit. If the bank pays less than all, the depositor shares ratably. His liability to the bank and the bank's liability to

him are wholly independent, and while one is fixed, the other is not. Simultaneously with insolvency the deposit is susceptible to change and shrinkage, but not so with the liability of the depositor to the bank.

With insolvency, the assets of the bank, so far as represented by deposits, ought to become impressed with the character of trust funds for ratable distribution among its depositors independently of the fact that the depositor owes the bank. Any other rule ignores the actual relation between a liability to the bank, which never changes, and a liability from the bank, which, as pointed out, is always subject to diminution. Any other doctrine emasculates the rule that assets of an insolvent bank constitute a trust fund for equitable distribution among the bank's creditors. It loses sight of the maxim that equality is equity. The authorities to the contrary base their reasoning on the proposition that the debtor of an insolvent bank loses none of his rights by the act of insolvency. (See *Van Wagoner v. Paterson Gaslight Co.*, 23 N. J. L. 283, cited in the *Mercer Case*, *supra*.) If he has a deposit in and owes the bank, he belongs to a favored class. If he has only a deposit in the bank, he is relegated to the class which must take what they can. There is no reason for holding that the one loses none of his rights, while the other does. It works a preference which without exception bears wholly upon the poor, for the poor are frequently depositors but rarely borrowers. Preferences should exist only through specific statutes allowing them, and in the absence of a law effecting such a result, courts should be loath to favor one class over the other.

Mr. Earle N. Genzberger, for Respondent, submitted a brief and argued the cause orally.

The attempted distinction drawn by counsel for appellant between the case of *Mercer v. Dyer*, 15 Mont. 317, 39 Pac. 314, and the case at bar is without merit. The cases quoted in the opinion clearly announce the overwhelming rule applicable, and no court now has the hardihood to dispute the reasoning and

logic found in the opinion from the case of *Van Wagoner v. Paterson Gaslight Co.*, 23 N. J. L. 283. The case of *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111, though in some respects different from the case at bar as to the facts, supports the general rule of equitable setoff for which respondent contends. If the court is inclined to feel that the Montana cases are not sufficient to convince it that respondent should prevail herein, we submit the following additional authorities: *Thompson v. Union Trust Co.*, 130 Mich. 508, 97 Am. St. Rep. 494, 90 N. W. 294; *Jack v. Klepser*, 196 Pa. 187, 79 Am. St. Rep. 699, 46 Atl. 479; *Balbach v. Frelinghuysen*, 15 Fed. 675; *Colton v. Dover Perpetual Building & Loan Assn. of Baltimore*, 90 Md. 85, 78 Am. St. Rep. 431, 46 L. R. A. 388, 45 Atl. 23; *Bernstein v. Coburn*, 49 Neb. 734, 68 N. W. 1021; *State v. Brobston*, 94 Ga. 95, 47 Am. St. Rep. 138, 21 S. E. 146; *Miller v. Franklin Bank*, 1 Paige (N. Y.), 444; *Fort v. McCully*, 59 Barb. (N. Y.) 87; *New Amsterdam Sav. Bank v. Tartter*, 54 How. Pr. (N. Y.) 385; *Sickels v. Herold*, 15 Misc. Rep. 116, 36 N. Y. Supp. 488; *Davis v. Industrial Mfg. Co.*, 114 N. C. 321, 23 L. R. A. 322, 19 S. E. 371; *In re Commercial Bank*, 4 Ohio Dec. 108; *Jordan v. Sharlock*, 84 Pa. 366, 24 Am. Rep. 198; *Jones v. Piening*, 85 Wis. 264, 55 N. W. 413; *Yardley v. Clothier*, 51 Fed. 506, 2 C. C. A. 349, 17 L. R. A. 462; *Adams v. Spokane Drug Co.*, 57 Fed. 888, 23 L. R. A. 334; *Hade v. McVay*, 31 Ohio St. 231. In 5 Cyc. 570 it is said: "A depositor is often indebted to the failed bank on notes or other obligations. If this obligation has matured, his liability may be reduced by setting off his deposit or a claim for services against the same, and this right is unaffected by the appointment of a receiver. The rule is almost as general that his deposit can be thus applied even though his obligation was not due at the time of the bank's insolvency." The foregoing is the prevailing rule in Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Missouri, Nebraska, New York, North Carolina, Ohio, Pennsylvania and Wisconsin and is also sustained by various decisions of the supreme court of the United States, particularly the case of

Scott v. Armstrong, 146 U. S. 499, 36 L. Ed. 1059, 13 Sup. Ct. Rep. 148, which case in turn is approved and cited in the case of *Mercer v. Dyer*, *supra*.

Counsel for appellant seek to point out a distinction that exists in the law as applied to savings banks, whereunder depositors in such institutions are held to be in the nature of copartners, etc. We submit there is neither reason nor recognized law for such a contention, and appellant occupies toward the respondent the identical relation that a depositor of a national bank would. There is no statute to be found in Montana, under the laws of which the State Savings Bank was organized, that deprives appellant from all the rights of setoff that are accorded generally to depositors of insolvent banks. "Depositors in savings banks organized under state laws are creditors of the bank and have the same rights as depositors of other banks." (*Robinson v. Aird*, 43 Fla. 30, 29 South. 633; *Ladd v. Androscoggin County Sav. Bank*, 96 Me. 520, 52 Atl. 1016; *Crosby v. Bowery Sav. Bank*, 67 How. Pr. (N. Y.) 329, 50 N. Y. Sup. Ct. 453; rules and regulations of pass-book binding; *Chase v. Waterbury Savings Bank*, 77 Conn. 295, 1 Ann. Cas. 96, 69 L. R. A. 329, 59 Atl. 37; *Langdale v. Citizens' Bank of Savannah*, 121 Ga. 105, 104 Am. St. Rep. 94, 2 Ann. Cas. 257, 69 L. R. A. 341, 48 S. E. 708; also *Cosgrove v. Provident Inst.*, 64 N. J. L. 653, 46 Atl. 617; *Ferguson v. Harlem Sav. Bank*, 43 Misc. Rep. 10, 86 N. Y. Supp. 825; see, also, 5 Cyc. 611, F, (2).) No distinction can be drawn between the powers given under trust companies pursuant to which the State Savings Bank operated as shown by the stipulated facts, and those given savings banks, so as to enable appellant to contend that the decisions cited by him as to savings banks prohibit setoffs in the case at bar. (See cases cited, Kerr's Cyc. Code of California, Civil Code, Part One, sec. 571, p. 538; *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110.) Although the State Savings Bank accepted funds designated as "savings deposits," this in no sense affected the general relation of debtor and creditor as between the bank and the depositor, and the same rule of setoff

applies to these deposits as to general checking deposits. The only difference was that one could be withdrawn at stated intervals to draw interest; the other was subject to check at any time without interest. The State Savings Bank was not a savings institution in the sense contemplated by the cases cited by appellant.

In addition to the foregoing authorities amply sustaining respondent's position, we submit the additional citations if the court considers it necessary further to investigate the questions involved: *Hayden v. Citizens' Nat. Bank of Baltimore*, 120 Md. 163, Ann. Cas. 1915A, 686, 46 L. R. A. (n. s.) 1059, 87 Atl. 672; *Richardson v. Anderson*, 109 Md. 641, 130 Am. St. Rep. 543, 25 L. R. A. (n. s.) 393, 72 Atl. 485; *Morris on Banks and Banking*, sec. 632; *City of Los Angeles v. State Loan & Trust Co.*, 109 Cal. 396, 42 Pac. 149; *Wells v. Black*, 117 Cal. 157, 59 Am. St. Rep. 162, 37 L. R. A. 619, 48 Pac. 1090; *Hall v. Burrell*, 22 Colo. App. 278, 124 Pac. 751; 5 Cyc. 569.

Upon the question of interest generally, we invite the attention of the court to the case of *Flynn v. American Banking & Trust Co.*, 104 Me. 141, 129 Am. St. Rep. 378, 19 L. R. A. (n. s.) 428, and note, 69 Atl. 771, and also the case of *People v. Merchants' Trust Co.*, 187 N. Y. 293, 79 N. E. 1004, 116 App. Div. 41, 101 N. Y. Supp. 255.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by plaintiff, as receiver of the Butte Savings Bank, to recover the sum of \$1,000 due from defendant to the bank upon a demand note for borrowed money, dated May 5, 1914, together with interest at the rate of eight per cent per annum. Though formal pleadings were filed, the cause was submitted to the trial court upon an agreed statement of facts, which may be epitomized as follows: The bank is a corporation organized under the laws of Montana as a savings trust deposit and security association, and, at the date of the execution of the note in controversy, was engaged at Butte, Montana, in con-

ducting the business such corporations are authorized to conduct under the provisions of section 3937 of the Revised Codes, including the holding of money on deposit payable on time or on demand, as well as in trust to accumulate at an agreed rate of interest. On August 5, 1914, it having become insolvent, the state examiner, by the order of the governor and attorney general of the state, took possession of it and all its assets and closed its doors. Thereafter the state, through the attorney general, brought an action to have its business adjusted and wound up and distribution of its assets made through the agency of a receiver. By agreement between the attorney general and the bank, plaintiff was appointed receiver. He at once qualified, took over all the assets from the examiner, and proceeded to perform his duties. Among the assets he found the note in question. When the examiner took possession, the defendant had on deposit subject to check, a balance of \$479.09. He also had a savings account for which he held a pass-book, showing a balance due him of \$215.33. Under the rules adopted by the bank, balances on savings accounts remaining on deposit for three months or more drew interest at the rate of four per cent per annum; the accruing interest being capitalized on the 1st days of January and July. The bank at its option could require notice of withdrawals of savings deposits as follows: Thirty days' notice for sums not exceeding \$100; sixty days' for sums exceeding \$100 and less than \$500; ninety days' for sums of \$500 and less than \$1,000, *etc.* The sum due defendant on his savings account consisted of his balance, with interest added up to July 1, 1914. On August 20 the plaintiff demanded of defendant payment of the full amount of his note. The defendant demanded that the plaintiff apply, as a part payment of the amount of the note, the balance on his check account, and also the balance shown by his pass-book on July 1, with interest at the rate of four per cent per annum from that date. He accompanied this demand with an offer to pay the balance remaining due on the note. The demand and offer were refused, on the ground that the defendant was entitled to such

proportion of these amounts only as will be found due ratably to all other creditors of the bank upon the final distribution of its assets. On August 3, 1914, the bank had notified all its customers having savings accounts with it that it would thereafter require notice of withdrawals as provided by its rules. Defendant did not at any time give notice that he intended to make withdrawal of his account or any part of it. At the trial, defendant contended that he was entitled to have credited upon the amount of the note the balance of his check account, with legal interest from August 20, when he demanded a settlement with the plaintiff, together with the balance on his savings account, with interest at the rate of four per cent from July 1. The court sustained both contentions, except that it disallowed interest on the first balance, and rendered judgment for the plaintiff for \$335.96, balance of principal and interest. The plaintiff has appealed.

At the hearing in this court, counsel for the plaintiff made the concession that, when the bank ceased to do business, all balances on savings accounts became due without previous notice to the bank or the receiver, thus eliminating this feature of the case. They submitted the question whether, upon the facts disclosed by the statement, the decision of the trial court allowing defendant credit, by way of counterclaims, for the amounts of his deposits, does not give him an unlawful preference over other depositors of the bank. Incidentally they also presented the inquiry whether the defendant is entitled to interest on either or both of his balances.

By a practically unanimous line of decisions, the courts have held that, when a receiver takes charge of the estate of an [1] insolvent, he occupies a position in no respect different from that of the insolvent prior to the appointment. He becomes merely the assignee of the insolvent, and has exactly the same rights. He is not an innocent purchaser in any sense of that term. An ordinary assignee takes an assignment of a thing in action "without prejudice to any setoff or other defense existing at the time of, or before notice of the assignment." (Rev.

Codes, sec. 6478; *Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111; *Cornish v. Woolverton*, 32 Mont. 456, 108 Am. St. Rep. 598, 81 Pac. 4.) The fact that the receiver becomes the assignee by virtue of his appointment does not put him upon any higher ground than when the assignment is the result of private contract. He is the arm of the court to accomplish the distribution of the assets of the insolvent. (*Colton v. Drovers' etc. Assn.*, 90 Md. 85, 78 Am. St. Rep. 431, 46 L. R. A. 388, 45 Atl. 23; *People v. California Safe Deposit & Trust Co.*, 168 Cal. 241, 141 Pac. 1181; *Receivers of People's Bank v. Paterson Gas L. Co.*, 23 N. J. L. 283; *Farmers' Deposit Nat. Bank v. Penn Bank*, 123 Pa. 283, 2 L. R. A. 273, 16 Atl. 761; 23 Am. & Eng. Ency. of Law, 2d ed., 1074.) On this subject Mr. Pomeroy says: "The general rule is that a receiver acquires no greater interest in an estate than the one from whom he takes; and it follows that choses in action pass to him subject to any right of setoff existing at the time of his appointment." (Pomeroy Eq. Remedies, secs. 186, 187.) The rule applies to a receiver of an insolvent bank, and the rights of those indebted to the bank are to be determined by their relations to it as they existed at the time the receiver was appointed. It is as much his duty to recognize and allow the right of setoff when it exists as it would have been if the bank itself had sought to enforce the collection of the particular claim. It was so held by this court in the case of *Mercer v. Dyer*, 15 Mont. 317, 39 Pac. 314, following the authority of *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 Sup. Ct. Rep. 148; *Yardley v. Clothier* (C. C.), 49 Fed. 337; *Id.*, 51 Fed. 506, 2 C. C. A. 349, 17 L. R. A. 462; and *Receivers of People's Bank v. Paterson Gas L. Co.*, *supra*. Further discussion of the subject in this jurisdiction, we think, ought to be foreclosed by this case. Counsel insist that the case is not decisive, for the reason that the claim involved was a trust fund when deposited in the bank; that it retained this attribute in the hands of the receiver; and that, being for this reason recoverable from him as a preferred claim, it was properly pleadable as a setoff. As we understand the case, the court

decided these propositions: (1) That the right of setoff was not impaired by the insolvency of the bank; and (2) that it was not prohibited by the national bank law. (U. S. Rev. Stats., sec. 5242; U. S. Comp. Stats. 1913, sec. 9834.) The mention of the character of the fund in the latter part of the opinion was made incidentally in discussing the question whether the warrant held by the bank at the time it became insolvent was due, and it and the deposit claimed as a setoff constituted mutual claims between the bank and the county. The case of *Stadler v. First Nat. Bank* recognized the rule as established by this case. Were it not decisive, we should nevertheless feel bound to yield our judgment to the overwhelming weight of authority on the subject. To the citations made above we may add the following: *Thompson v. Union Trust Co.*, 130 Mich. 508, 97 Am. St. Rep. 494, 90 N. W. 294; *Jack v. Klepser*, 196 Pa. 187, 79 Am. St. Rep. 699, 46 Atl. 479; *Balbach v. Frelinghuysen* (C. C.), 15 Fed. 675; *Salladin v. Mitchell*, 42 Neb. 859, 61 N. W. 127; *State v. Brobston*, 94 Ga. 95, 47 Am. St. Rep. 138, 21 S. E. 146; *Miller v. Receivers of Franklin Bank* (N. Y.), 1 Paige, 444; *Fort v. McCully* (N. Y.), 59 Barb. 87; *Davis v. Industrial Mfg. Co.*, 114 N. C. 321, 23 L. R. A. 322, 19 S. E. 371; *Jones v. Piening*, 85 Wis. 264, 55 N. W. 413; *Adams v. Spokane Drug Co* (C. C.), 57 Fed. 888, 23 L. R. A. 334; *Hade v. McVay*, 31 Ohio St. 231; *McCagg v. Woodman*, 28 Ill. 84; *Re Assignment of Hamilton*, 26 Or. 579, 38 Pac. 1088; *Steelman v. Atchley*, 98 Ark. 294, 32 L. R. A. (n. s.) 1060, 135 S. W. 902; *Osborn v. Byrne*, 43 Conn. 155, 21 Am. Rep. 641; *Tourtlot v. Whithed*, 9 N. D. 467, 84 N. W. 8; see, also, Michie on Banks and Banking, 634; *Pomeroys* Eq. Remedies, sec. 188.

The relation of the defendant to the bank was not that of a [2] creditor only. He was also its debtor; and though his debt exceeded his claim against the bank, in an action by the bank against him he would have been entitled to a setoff by way of counterclaim. The claim of the bank was a valuable asset only so far as it was not offset by its debt to him. That he is

entitled to his discharge upon payment of the difference does not give him a preference over any other creditor.

Counsel argue, however, that this general rule can have no application to this case, for the reasons that the bank was doing [3] business as a savings institution; that the defendant occupies toward its assets a relation similar to that of a stockholder in a commercial bank; and hence that his rights are to be determined by the rule applicable to such stockholders. In support of this contention they quote from Michie on Banks and Banking as follows: "Upon the insolvency of a savings bank, an ordinary depositor cannot set off his deposit against a debt due from him to the bank, and this is so though the debt is for borrowed money. Neither the depositor's pledge of his deposit book to the bank as collateral security, nor the bank's expectation, at the time the debt is created, that he will apply his deposit in payment thereof, entitle him to set it off in payment of the debt." (Vol. 3, p. 2246.) They also cite several cases upon which this author bases his text, among them *Osborn v. Byrne*, *supra*; *Cogwell v. Rockingham etc. Sav. Bank*, 59 N. H. 43; *Stockton v. Mechanics & Laborers' Sav. Bank*, 32 N. J. Eq. 163; and *Hannon v. Williams*, 34 N. J. Eq. 255, 38 Am. Rep. 378. We do not doubt the propriety or soundness of the rule announced in these cases. The character of the institution under consideration in each of them was such as to distinguish it from one organized and conducted for commercial purposes. Such an institution has no capital stock. Its incorporators have no property interest in the funds deposited in it. Their sole office is to manage and invest them as guardians and trustees for the depositors. The latter alone are interested in the prosperity of the institution. The assets are its invested funds made up of the common contributions of all the depositors. All the profits of the business are divided among the depositors or accumulated in a surplus fund for the common benefit or for greater security. Indeed, such a bank is treated in all these cases as a quasi-charitable and benevolent institution. One of the kind under consideration here has none of the attributes of

such an institution. By reference to the statute providing for its organization and regulating its business (Rev. Codes, secs. 3923-3944), it will be found that it must be classed among corporations organized for profit and as bearing the same general relation to its depositors as do such corporations. It must have a capital stock, which is represented by shares issued to the stockholders and transferable upon its books by the mode provided by its by-laws. Its board of directors invests the capital stock and deposits for the profit of the stockholders. The stockholders are liable for the debts incurred by it to the extent of the value of the shares held by them. It may engage in eleven different kinds of business, none of them partaking in any measure of the nature of the business of a savings institution, except that deposits may be received and held by it for accumulation at such a rate of interest as may be agreed upon. Its profits are divided among the stockholders—not the depositors. The latter have no interest in them. Its property is subject to taxation in the same manner as that of national banks. It thus appears that, though the insolvent bears the name “Butte Savings Bank,” it is not a “savings bank” within the meaning of the cases referred to *supra*, but a “commercial bank” pure and simple. The distinction between institutions falling within the two classes, has been recognized by the courts and the rights of depositors determined accordingly. (*Robinson v. Aird*, 43 Fla. 30, 29 South. 633; *People v. Mechanics & Traders’ Sav. Inst.*, 92 N. Y. 7.) Nor does the designation it bears require it to be classed under the head of savings banks, within the meaning of the statute providing for the organization and regulation of savings banks, as such, under our Code. (Rev. Codes, secs. 3945-3958.) It was not organized under these provisions. Even so, it would seem that the relation between it and its depositors would not be governed by the rule stated by Mr. Michie, *supra*. By an examination of these provisions it will be found that, subject to certain restrictions as to the character of the business which may be conducted by them and requirements to be observed for the greater security of the depositors, they are

not benevolent or charitable in their nature, but are organized primarily for the benefit of the stockholders, who are entitled to all the profits of the business after the depositors have been paid such rates of interest upon their deposits as may be provided by the by-laws. Whether the rule contended for applies to them we shall not undertake to decide, because it does not arise in this case. We are clear in the conviction, however, that it cannot justly be applied to a corporation organized for purely commercial purposes, as was the case here.

The effect of the suspension and declared insolvency of the bank was to make the defendant's deposits due and actionable. (*Stadler v. First Nat. Bank, supra.*) This being so, [4] he was entitled to receive interest from August 5 until the date of the judgment. (Rev. Codes, sec. 6043; *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201; *Leggat v. Gerrick*, 35 Mont. 91, 8 L. R. A. (n. s.) 1238, 88 Pac. 788.) Of the decision of the trial court in this behalf, however, neither party is in position to complain. In fact, the defendant does not complain, because he has not appealed. Nor has he by cross-assignment in his brief asked that the judgment be modified. (Rev. Codes, sec. 7118.) The plaintiff cannot complain, for the reason that the court disallowed interest on the check balance and charged interest on the savings balance, as though the deposit agreement was still in full force. If it remained in force notwithstanding the insolvency of the bank, the allowance was proper as made; otherwise the contract was broken down, and allowance of the legal rate should have been made from the date at which the state auditor took charge.

Judgment affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. JUSTICE HOLLOWAY, being absent, did not hear the argument, and takes no part in the foregoing decision.

STATE EX REL. KLICK, APPELLANT, v. WITTMER, RE-
SPONDENT.

(No. 3,419.)

(Submitted October 28, 1914. Decided November 27, 1914.)

[144 Pac. 648.]

*Cities and Towns—Offices—When Incompatible—City Council
—Vacancies—How Filled.*

Offices—When Incompatible.

1. Offices are incompatible when the incumbent of one has power of removal over the other, or when one has power of supervision over the other, or when the nature and duties of the two render it improper, from considerations of public policy, for one person to retain both.

Same—Aldermen—City Purchasing Agent—Incompatible Offices.

2. *Held*, under the above rule, that the office of alderman and that of purchasing agent of a city were incompatible and that therefore one individual could not fill both at the same time.

Same—Vacancy—Implied Resignation.

3. As to an office which the incumbent may vacate by his own act, a resignation impliedly occurs upon his acceptance of another office incompatible therewith.

[As to loss of one office by acceptance of another, see note in 86 Am. St. Rep. 578.]

Same—City Council—Vacancy—Majority Vote—What Constitutes.

4. Where one member of a city council, consisting of ten aldermen, impliedly resigned his position by accepting an incompatible city office, a vacancy occurred which was properly filled by a majority vote of five of the council as then constituted.

*Appeal from District Court, Cascade County; H. H. Ewing,
Judge.*

ACTION by the State, on the relation of Theodore Klick, against J. G. Wittmer. From a judgment for defendant rendered after sustaining a general demurrer to the complaint, the relator appeals. Reversed and remanded.

Mr. E. A. Smith, for Appellant, submitted a brief and argued the cause orally.

Messrs. Cooper & Stephenson, for Respondent, submitted a brief.

MR. JUSTICE SANNER delivered the opinion of the court.

Appeal from a judgment after an order sustaining a general demurrer to the complaint. The facts recited are: That the city of Great Falls possesses five wards, and its common council consists of ten aldermen, two from each ward; that on June 30, 1913, J. G. Wittmer was, and since April 13, 1913, had been, one of the duly elected, qualified and acting aldermen from the fifth ward of said city; that on June 30 he was appointed by the mayor to the office of "city purchasing agent," which office had been created by ordinance approved May 26, 1913; that his appointment was confirmed by the council and he immediately accepted, qualified and entered upon the duties of said office, and has since received and enjoyed the salary attached thereto, to-wit, \$50 per month; that at the regular meeting of the city council of Great Falls held September 2, 1913—all the members thereof as well as the mayor being present, the said Wittmer assuming to act as alderman from the fifth ward—the following resolution was presented and read by Alderman Johnston: "Whereas there exists a vacancy in the office of alderman from the fifth ward, caused by the appointment and qualification of former Alderman J. G. Wittmer to the office of city purchasing agent, an office incompatible with the office of alderman, I hereby nominate Theodore Klick, residing at 611 First Avenue Southwest, within the said fifth ward, by occupation a stable boss, to fill such vacancy;" that said nomination was duly seconded, but the mayor refused to entertain the same, and, on appeal from the decision of the chair, five aldermen voted against sustaining such decision; that the mayor, however, declared a tie by including the vote of Wittmer with four others to sustain said decision, and thereupon resolved the tie by himself voting to sustain such decision; that thereupon five aldermen "requested the recording of their votes in favor of the nominee—Theodore Klick—as alderman from the fifth ward to fill the vacancy herein alleged," which five votes were so recorded by the city clerk and made part of the records of the proceedings of the council; that Klick possesses the necessary qualifications to hold the office

of alderman and filed his official oath in due time, but Wittmer persists in unlawfully acting and intruding himself into such office.

The questions presented are: Was there a vacancy in the office of alderman from the fifth ward to be filled by the election of the city council; and, if there was, was the relator elected thereto?

1. Whether a vacancy occurred in the office of alderman in consequence of the acceptance by Wittmer of the appointment as purchasing agent depends upon the power of the city council to create such office, and upon the nature of the office. No question is raised as to the power of the city council to create this office, and we shall therefore assume, without deciding, that it had such power. By reference to the ordinance creating the office we learn: "The city purchasing agent shall be appointed by the mayor. * * * His duties shall be to make all purchases of sundries and supplies for all departments of the said city; he shall keep a complete record of all his purchases, acts and doings, an accurate account of all the supplies purchased and the price paid therefor. * * * That all bills against the city for purchases shall be filed with the purchasing agent, who shall examine and approve or disallow the same and recommend to the council the payment or rejection of the same, and report the said bills to the said council at its first regular meeting in each month, or oftener, for allowance or rejection by the said council. * * * The said purchasing agent shall, before entering upon his duties, take the oath of office and execute a bond in such sum as the council may require, but for not less than \$1,000, * * * the same to be in proper form and approved by the city council."

We think the office thus created and defined is clearly [1] incompatible with the office of alderman. Offices are "incompatible" when one has power of removal over the other (29 Cyc. 1382; *Attorney General v. Council*, 112 Mich. 145, 37 L. R. A. 211, 70 N. W. 450), when one is in any way subordinate to the other (*State v. Jones*, 130 Wis. 572, 118 Am. St. Rep. 1042,

10 Ann. Cas. 696, 8 L. R. A. (n. s.) 1107, 110 N. W. 431), when one has power of supervision over the other (*State v. Taylor*, 12 Ohio St. 130; *Cotton v. Phillips*, 56 N. H. 220; *State v. Hilton*, 80 N. J. L. 528, 78 Atl. 16), or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both (*Mechem on Public Officers*, sec. 422; *State v. Anderson*, 155 Iowa, 271, 136 N. W. 128; *State v. Thompson*, 122 N. C. 493, 29 S. E. 720; *State v. Goff*, 15 R. I. 505, 2 Am. St. Rep. 921, 9 Atl. 226; *Magie v. Stoddard*, 25 Conn. 565, 68 Am. Dec. 375; *People v. Commissioners*, 76 Hun, 146, 27 N. Y. Supp. 548; *State v. Buttz*, 9 S. C. 156). The relations between the office of alderman of Great Falls and that of purchasing agent, as [2] created by the ordinance above referred to, are within all these specifications. The office of purchasing agent was not created under Title III of Part IV of the Political Code (Rev. Codes, secs. 3216-3218); the city council may therefore, by a bare majority vote, abolish it at any time and discharge the person appointed to fill it (Rev. Codes, sec. 3220). Thus the incumbent of it, if he be an alderman, may, in certain circumstances, exercise absolute control over the existence and tenure of his office, or, in the desire to save his office threatened by abrogation, he may be induced to assent to measures the virtue of which he does not perceive. Again, as to a portion of his duties he is an agent of the council and subject to its supervision. It may disavow or curtail his general policy, reject his recommendations, or disallow the bills incurred by him; in any event, as member of the council he is placed in the position of supervising and affirming his own acts. Finally, if he be alderman as well as agent, he may pass upon, and possibly determine, the amount and sufficiency of his own bond. Further discussion is not necessary to establish that the holding of these offices by the same person is contrary to public policy.

The contention of respondent is that the foregoing is of no importance to the question at bar, because vacancies are created [3] only by the causes set forth in section 420, Revised Codes,

among which the acceptance of an incompatible office is not enumerated. This argument is based upon certain expressions in *State ex rel. Chenoweth v. Acton*, 31 Mont. 37, 39, 77 Pac. 299, to the effect that the provisions of section 420 are exclusive; but these expressions, unnecessary to the decision of that case, have not been accepted as controlling since *State ex rel. Jones v. Foster*, 39 Mont. 583, 104 Pac. 860, was written. For the purposes of the instant case, however, we may assume the exclusiveness of section 420, without at all aiding the respondent's position; for, though we grant that a vacancy is not created by any circumstance not mentioned therein, it does not follow that a resignation, which is mentioned therein as a cause of vacancy, may not impliedly arise upon the acceptance of an incompatible office. On the contrary, the authorities are practically unanimous that, as to an office which the incumbent may vacate by his own act, a resignation does occur upon his acceptance of another office incompatible therewith. (*King v. Trelawney*, 3 Burr. 1616; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *State v. Brinkerhoff*, 66 Tex. 45, 17 S. W. 109; *Van Orsdall v. Hazard*, 3 Hill (N. Y.), 243; *Magie v. Stoddard*, *supra*; *People v. Hanifan*, 96 Ill. 420; *State v. Thompson*, *supra*; *State v. Goff*, *supra*; *Cotton v. Phillips*, *supra*; *Pooler v. Reed*, 73 Me. 129; *Biencourt v. Parker*, 27 Tex. 558; *Mann v. Darden*, 171 Ala. 142, 54 South. 504.)

The respondent having resigned his position as alderman by [4] accepting the office of city purchasing agent, a vacancy was created in the council, and its membership became reduced to nine. That vacancy the city council was authorized to fill by a majority vote of the members then composing the council. The relator was formally nominated to fill such vacancy, the votes of five members were recorded in his favor, and he was elected—the mayor's position to the contrary notwithstanding. (*State ex rel. Wilson v. Willis*, 47 Mont. 548, 133 Pac. 962.)

If the complaint correctly states the facts, the respondent became an intruder in the office of alderman from the moment he accepted the appointment as purchasing agent. He certainly

ceased to have any warrant for exercising its functions after the relator's election and the filing of his official oath. It follows that the judgment appealed from must be reversed, with directions to overrule the demurrer; and it is so ordered.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY CONCURS.

MR. JUSTICE HOLLOWAY did not hear the argument and takes no part in the foregoing decision.

STATE, RESPONDENT, v. VINN, APPELLANT.

(No. 3,508.)

(Submitted October 26, 1914. Decided November 28, 1914.)

[144 Pac. 773.]

*Criminal Law—Rape—Indictment—Information—Procedure—
Waiver—Evidence—Age of Prosecutrix—Public Records—
Instructions—Witnesses—Credibility—Jury Question.*

Criminal Law—Indictment—Information—Procedure.

1. After dismissal of an indictment because of insufficiency, defendant could properly be charged with the same crime by information filed by order of the district court, without a preliminary examination.

[As to right of grand jury to find indictment before or pending preliminary examination, see note in Ann. Cas. 1912D, 145.]

Same—Procedure—Waiver.

2. Under section 9194, Rev. Codes, by entering his plea without a written motion to set aside the information and consenting to go to trial, defendant waived his right to question the propriety of proceedings prior to the filing of the information.

Same—Defective Indictment—Dismissal—Information.

3. *Held*, under section 8, Article III of the Constitution, and section 9204, Revised Codes, that, after dismissal of an indictment because of substantial defects therein, the district court may, but is not required to, submit the case to another grand jury, or permit, or order, the county attorney to file an information charging the defendant with the same offense ineffectually sought to be charged against him by the indictment.

Same—Rape—Evidence—Admissibility.

4. In a trial for rape, the prosecuting witness was properly permitted to testify to acts of sexual intercourse between her and defendant prior to the date of the act charged in the information, such evidence being

admissible in corroboration of her testimony relating to the act for which defendant was on trial.

Same—Rape—Age of Prosecutrix—Evidence—Admissibility.

5. Testimony, in a rape case, by prosecutrix that she derived knowledge of her age from statements made by her mother and from a certificate of baptism which she had seen at the home of her parents, was not objectionable as hearsay.

Same—Public Records—Evidence—Admissibility.

6. The school census of the county in which prosecutrix attended school, required by Chapter 76, Laws of 1913 (par. 3, sec. 512) to be kept by the superintendent of schools, was a public record, and as such admissible as *prima facie* evidence, among other things, of the age of prosecutrix.

Same—Rape—Evidence of Prosecutrix—Sufficiency.

7. Under Section 7861, Revised Codes, the evidence of the prosecutrix alone, if believed by the jury, is sufficient to sustain a conviction of the crime of rape.

Same—Evidence—Precautionary Instruction—Request.

8. In a prosecution for rape, where the court properly charged that conviction could be had upon the uncorroborated testimony of the prosecutrix, accused was not in a position to complain that the jury were not also charged to weigh her testimony in connection with the other evidence in the case, in the absence of a request and refusal of a special precautionary instruction.

Same—Credibility of Witnesses—Jury Question.

9. The questions of the credibility of the witness and the weight of the testimony are for the jury.

Appeal from District Court, Fergus County; Roy E. Ayres, Judge.

FRANK VINN was convicted of the crime of rape, and appeals from the judgment and order denying him a new trial.

Mr. John A. Coleman, for Appellant, submitted a brief and argued the cause orally.

The court erred in admitting the testimony of the prosecutrix as to her age, based upon an alleged baptismal record or certificate, for the reason that any information or knowledge gained by the prosecutrix by reason of any alleged baptismal certificate, would be calling for hearsay testimony; but this kind of evidence could not be received under any circumstances where the mother of the child was present in court as a witness and easily obtainable as such by the prosecution. Baptismal certificate and record is evidence of date of baptism, but not of birth, though stated therein. (*Durfes v. Abbott*, 61 Mich. 471, 28 N. W. 521; *Berry*

v. *Hull*, 6 N. M. 643, 30 Pac. 936; *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654; *Lavin v. Mutual Aid Soc.*, 74 Wis. 349, 43 N. W. 143; *Greenleaf v. Dubuque & S. C. R. Co.*, 30 Iowa, 301; *Kobbe v. Price*, 14 Hun (N. Y.), 55; *Tessmann v. Supreme Commandery etc.*, 103 Mich. 185, 61 N. W. 261.) The testimony of the mother was best evidence. (*Hermann v. State*, 73 Wis. 248, 9 Am. St. Rep. 789, 41 N. W. 171; *Smith v. Geer*, 10 Tex. Civ. App. 252, 30 S. W. 1108; *State v. Woods*, 49 Kan. 237, 30 Pac. 520; *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.) On a trial for rape the prosecutrix must testify from her own knowledge as to her age, and not as to what her mother may have said, especially where the mother is a witness and is present in court. (*Johnson v. State*, 42 Tex. Cr. 298, 59 S. W. 898; *Taylor v. Hawkins*, 1 McCord (S. C.), 164.)

The court erred in admitting the testimony of Alice O'Hara, with reference to an alleged school census in which it was claimed was entered the name of Florence Vinn, giving her age, for the reason that the same is not properly identified, was purely hearsay and incompetent for the reason that it was not clearly shown who had made up the record. Entries in a school census book as to the age of the prosecutrix are not admissible, and if offered for the purpose of impeachment it must be shown that the witness sought to be impeached was the identical person who gave the information to the school enumerator, as therein recited. (*Battles v. Tallman*, 96 Ala. 403, 11 South. 247.) The clerk of the school district, who presumably made up the census book was the proper person to identify the records and state in what manner the information was secured.

In the absence of a statute requiring corroboration, the unsupported testimony of the prosecutrix, if believed by the jury, is sufficient to convict of rape; but the defendant should not be convicted without corroboration where the testimony of the prosecutrix bears on its face indications of unreliability or improbability, and particularly when it is contradicted by other evidence; and where the evidence preponderates in favor of

defendant, or the verdict appears to have been influenced by less, there is corroboration of prosecutrix. (33 Cyc. 1497; *Mathews v. State*, 19 Neb. 330, 27 N. W. 234.)

Where the defendant is charged with the crime of rape, testimony of the prosecutrix with reference to other acts of intercourse before and after the date of the one alleged in the information should be excluded from the consideration of the jury, as such other acts did not tend to directly prove the commission of the particular act relied upon by the state for conviction. The admission of such testimony would greatly tend to influence the minds of the jury, and would be undoubtedly greatly prejudicial in their effect. (*State v. Bonsor*, 49 Kan. 758, 31 Pac. 736; *People v. Harris*, 103 Mich. 473, 61 N. W. 871; *Parkinson v. People*, 135 Ill. 401, 10 L. R. A. 91, 25 N. E. 764; *State v. Stevens*, 56 Kan. 720, 44 Pac. 992; *People v. Etter*, 81 Mich. 570, 45 N. W. 1109; *People v. O'Sullivan*, 5 N. Y. St. Rep. 132; 33 Cyc. 1483; *contra*, *State v. Peres*, 27 Mont. 358, 71 Pac. 162.)

Mr. D. M. Kelly, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, submitted a brief; *Mr. Wagner* argued the cause orally.

Error is predicated upon the action of the court in admitting the testimony of the prosecutrix as to her age. That this was not error, see *State v. Bowser*, 21 Mont. 133, 53 Pac. 179. In *Morrison v. Emsley*, 53 Mich. 564, 19 N. W. 187, it is held that the best evidence of a person's age is the testimony of the person whose age is in question. It is urged, however, that the witness was permitted to testify that she gained knowledge of her age from the contents of a baptismal certificate which she claimed to have seen some years before at her former home in Wisconsin, and that this evidence should have been excluded. The error, if any, in admitting this evidence was cured by the cross-examination of the witness by counsel for defendant.

It is also urged the court erred in admitting testimony of the school census to show the age of prosecutrix. In this state it is required by law to keep a census of school children. It is a

public record, and may be received in evidence for the purpose of showing the age of any census child. (*Swift & Co. v. Renard*, 119 Ill. App. 173; *Levels v. St. Louis etc. Ry. Co.*, 196 Mo. 606, 94 S. W. 275; *Hendrick v. Hughes*, 15 Wall. (U. S.) 123, 21 L. Ed. 52; 17 Cyc. 308-310.)

It is contended the court erred in admitting evidence of other acts of intercourse than the one relied upon for conviction. The question is set at rest in this state by the case of *State v. Peres*, 27 Mont. 358, 71 Pac. 162. This case is supported by the weight of authority. (33 Cyc. 1483.) The cases cited by appellant in support of his contention are not authority. The two Kansas cases cited by appellant are overruled by the later case of *State v. Borchert*, 68 Kan. 360, 74 Pac. 1108. The Michigan cases cited are in conflict with the case of *People v. Abbott*, 97 Mich. 484, 37 Am. St. Rep. 360, 56 N. W. 862. The New York case cited by appellant is in conflict with the case of *People v. O'Sullivan*, 104 N. Y. 481, 58 Am. Rep. 530, 10 N. E. 880.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant, charged by information with statutory rape, committed in Fergus county upon Florence Vinn, a female under the age of eighteen years, was convicted and sentenced to a term of service in the state prison. He has appealed from the judgment and an order denying his motion for a new trial. He was first accused by indictment found and presented by a grand jury on February 27 of this year. Upon arraignment thereon he entered his plea of not guilty, and the trial was set for March 11. At that time, after a jury had been impaneled, an objection by counsel to the introduction of evidence by the prosecution, on the ground that the indictment did not state a public offense, was sustained, and the indictment dismissed. Thereupon the court ordered the defendant to be held in custody, and directed the county attorney to file an information, counsel for defendant objecting and reserving an exception. On the

following day the information was presented and filed. The defendant, having been brought into court and arraigned, waived the time allowed by the statute in which to plead, entered his plea of not guilty, and consented to be put upon his trial immediately.

1. The jurisdiction of the court is challenged, on the ground [1] that it erred in directing the county attorney to file an information after the indictment was dismissed. Counsel insists that the defendant had the right either to have a preliminary examination previous to the filing of the information, or to have the case submitted for investigation to another grand jury. The question presented by the first alternative of counsel's contention is disposed of by the cases of *State v. Bowser*, 21 Mont. 133, 53 Pac. 179, and *State v. Chevigny*, 48 Mont. 382, 138 Pac. 257. In the former it was held that the defendant is not entitled, as a matter of right, to have a preliminary examination prior to the filing of an information, because the Constitution specifically provides that an information may be filed either after examination and commitment, or after leave granted by the court. It was there said: "There can be no interpretation put upon any statute of the state which will take away the constitutional right of prosecution by information filed in the district court after leave has been granted by the court, where there has been no examination and commitment, or where there has been no prosecution by indictment."

The order directing the filing of the information was certainly equivalent to granting leave to file it. This being so, and the court having jurisdiction of the offense, by entering his plea [2] without a written motion to set aside the information and consenting to go to trial, the defendant waived his right to question the propriety of the prior proceedings. (*State v. Chevigny, supra*; Rev. Codes, sec. 9194.) By what we have so far said we do not mean to concede that there was any irregularity in the proceedings. If, under the particular circumstances, the county attorney was authorized to prosecute by information, instead of upon indictment, whether leave was granted in the form of an

order peremptory or permissive in character, the result was the same.

The question presented by the second alternative is whether, [3] after a defendant has once been indicted by a grand jury, and the indictment has been dismissed because of substantial defect in it, the county attorney may prosecute by information. In other words, if a prosecution has been initiated by indictment under the provision of the Constitution (Art. III, sec. 8), must it be conducted to final judgment exclusively by this method? The provision of the Constitution, so far as pertinent here, is as follows: "All criminal actions in the district court, except those on appeal, shall be prosecuted by information, after examination and commitment, by a magistrate, or after leave granted by the court, or shall be prosecuted by indictment without such examination or commitment, or without such leave of the court."

By entering his plea without testing the indictment or information by demurrer, the defendant waives all defects therein, except that the court has not jurisdiction over the offense, and that the facts stated do not constitute an offense. The pleading may be tested in either or both of these respects by appropriate objection at the hearing; the objection being equivalent to, and serving the purpose of, a demurrer. (Rev. Codes, sec. 9208.) Section 9204 of the Revised Codes provides: "If the demurrer is allowed, the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, or another or an amended information, directs the case to be submitted to another grand jury, or directs another or an amended information to be filed." We are inclined to the opinion that the question submitted was not properly reserved by objection at the hearing, but that the defendant should have moved formally to set aside the information. For present purposes we shall waive this question and consider the defendant's objection at the time the order was made, followed by his objection at the hearing, as properly presenting it.

So far as we have been able to ascertain, the provision of our Constitution *supra* is not found in that of any other state. In some of the states, as in Tennessee, all public offenses, except when the proceeding is by impeachment, may be prosecuted only upon indictment or presentment. (Const. Tenn., Art. I, sec. 14.) In others, as in Louisiana, any crime not capital, except one arising in the militia, may be prosecuted by indictment or information. (Const. La. 1884, Bill of Rights, Art. V.) In still others, as in California, with the exceptions mentioned, prosecutions may be by information after examination and commitment by a magistrate, or by indictment with or without such commitment, as may be provided by law. (Const. Cal., Art. I, sec. 8.) In Idaho the prosecution by information must be preceded by an examination and commitment. (Const. Idaho, Art. X, sec. 8.) It will be observed that in all of these provisions the course to be pursued by the prosecuting authorities is definitely marked out or may be declared by the legislature. While it was held in *State v. Ah Jim*, 9 Mont. 167, 23 Pac. 76, that the provision in our Constitution was not self-executing, but required legislative action to put it in force, it has never been held that it is within the power of the legislature to limit the scope of the provision by imposing upon the courts and prosecuting officers restrictions other than those declared therein. One of the purposes of the convention in formulating it, and the people in adopting it, was to dispense with the slow, expensive, and therefore unsatisfactory procedure by indictment, and to substitute a procedure expeditious and inexpensive, to be availed of by the prosecuting officers at their discretion, subject to control by the court, to guard a particular defendant against oppression and malice, and prevent abuse of power by the county attorney. (*State v. Brett*, 16 Mont. 360, 40 Pac. 873; *State v. Cain*, 16 Mont. 561, 41 Pac. 709.) The precedent examination and commitment by a magistrate, or the authority of the court to withhold leave to prosecute, was deemed sufficient, ordinarily, to safeguard the citizen from an unwarranted prosecution which might, in exceptional cases, be prompted by well-meaning

ignorance or the malice of a public prosecutor. The provision, in effect, declares that no citizen shall be held to answer, except upon a charge preferred by one of the methods of procedure indicated. There is nothing in it to indicate an intention that any citizen has a vested right to be charged by one method, to the exclusion of the other. Its provisions are in the alternative, without express limitations as to either, and we think it was the intention that either the indictment or information should be available, and that either might be resorted to in case the other should not be available, or for any cause break down during the progress of the prosecution. Of course, the prosecution cannot be conducted by information and indictment both. Nor, after the defendant has been once tried and finally convicted or acquitted, may he be put upon trial for the same offense again. (Const., Art III, sec. 18.) But this does not mean that, after an indictment has been dismissed, he may not be charged with the same offense by any method the use of which is permitted by the Constitution, until his guilt or innocence has been ascertained by the verdict of a jury, or, in any event until he has once been in jeopardy.

We have been referred to but a single case in which the identical question under consideration has been discussed. Under a statute providing that offenses might be prosecuted either by indictment or information, the supreme court of Kansas held that the finding of an indictment by a grand jury did not limit the state, from the inception to the close of the prosecution, to one form of procedure, but that it was competent for the county attorney to prefer an information charging the same offense, though an indictment was still pending. The court said: "Of course, a party cannot be put upon trial upon an indictment and information for the same offense at the same time; and in this sense the state cannot prosecute by indictment and information. But the indictment and information are simply the pleadings on the part of the state. Each one constitutes a separate action, and it is not bound to dismiss one

action before it commences another." (*State v. McKinney*, 31 Kan. 570, 3 Pac. 358.)

The cases of *Alderman v. State*, 24 Neb. 97, 38 N. W. 36, *State v. Stewart*, 47 La. Ann. 410, 16 South. 945, and *United States v. Nagle*, 17 Blatchf. 258, Fed. Cas. No. 15,852, discuss analogous questions and are at least persuasive. But, without the authority of these cases, we think the purpose of the provision was as stated above, and that, when the indictment in this case was found insufficient, the county attorney had authority, under the control of the court, to initiate a prosecution by information. Nor do we think the statute *supra* should be construed as prescribing a different rule. If, as we have said, the provision of the Constitution intended that public offenses should be prosecuted either by indictment or information, according as the exigencies of the public welfare required, then, as said in *State v. Bowser*, *supra*, no interpretation can be put upon any statute that limits or restricts its meaning. And though the statute seems to declare that, when an indictment has been held defective on demurrer, the defendant is entitled to go free, unless the court directs the case to be submitted to another grand jury, we construe it to mean that, when this exigency arises, the court is vested with a discretion to pursue this course or permit an information to be filed curing the defects disclosed by the demurrer. The legislature certainly could not have intended that, notwithstanding the facts in the possession of the county attorney and brought to the knowledge of the court, showing that the public welfare requires a prosecution of the defendant, resort must be had again to the slow and expensive procedure of indictment, when the procedure by information would be just as safe and effective and far more expeditious. This construction may seem forced. We must, however, adopt it, or declare the statute to be an unwarranted limitation of the constitutional provision, and hence invalid. This we do not feel it necessary to do.

2. It appeared from the evidence that Florence Vinn is the daughter of Mrs. Frank Vinn by a former husband, whose name

[4] was Trummer; the daughter being called by the name of her stepfather. She was permitted to testify to various acts of intercourse with her by her stepfather, prior to the date of the act charged in the information. The contention is made that the evidence was incompetent, and must have prejudiced the jury, because it tended to prove other distinct offenses by the defendant. While there is some conflict in the decisions on the point, we think the case of *State v. Peres*, 27 Mont. 358, 71 Pac. 162, should be accepted as settling the rule in this jurisdiction. Under this decision the contention made by counsel must be overruled. As in that case, the court in this case, by proper instruction, limited the purpose for which the evidence was admitted. It is not controverted that the instruction was correct, if the evidence was competent.

3. The only witness introduced by the state in chief was Florence Vinn. She testified that on March 27, 1913, the date of the crime charged, she was in her seventeenth year, having been [5] born on July 9, 1895. She was questioned further as to the sources of her knowledge, and stated that her mother had told her of the date of her birth. She also stated that she had seen the certificate of her baptism, which recited the date of her birth. It was objected that this evidence was not admissible, because it was hearsay. Such evidence falls within the exception to the general rule against hearsay. In *State v. Bowser*, *supra*, this court said: "Recent authorities hold that the age of a prosecuting witness alleged to be under the age of consent may be proved by her own testimony. (Underhill on Criminal Evidence, sec. 342; Wharton's Criminal Evidence, sec. 236; *People v. Ratz*, 115 Cal. 132, 46 Pac. 915; *Bain v. State*, 61 Ala. 75.) The fact that the witness derived her knowledge of her age from statements of her parents, or family reputation, does not make it inadmissible. Persons of the age of discretion, and many who are of even tender years, know enough of themselves to state their ages with intelligence and accuracy. Such testimony is often essential to prove age, and for this reason it is

competent, being excepted from the rules generally excluding hearsay evidence."

Counsel also make the point that the court erred in permitting the witness to testify that she had seen the certificate of baptism at the home of her parents in Wisconsin, where she was born, prior to their removal, first to Iowa, then to Minnesota, and subsequently to Montana. It may be conceded, as counsel contend, that the baptismal record was not admissible to prove the date of the witness' birth, though it recited this date. (*Durfee v. Abbott*, 61 Mich. 471, 28 N. W. 521; *Greenleaf v. Dubuque & S. C. Ry. Co.*, 30 Iowa, 301; *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256, 50 Pac. 654.) The result of the examination, however, was not to introduce the contents of the certificate, but to disclose to the jury how, in part, the witness obtained her knowledge. If the person whose age is in question may prove it by his own testimony, the fact that he gains his knowledge from the statements of his parents or from family reputation does not render his testimony inadmissible. (*State v. Bowser*, *supra*; *People v. Ratz*, 115 Cal. 132, 46 Pac. 915.) He certainly cannot have personal knowledge of the circumstances attending his birth, nor of its date. Neither do we see how such testimony can be rendered incompetent by the fact that the same knowledge has also been gained by the reading of writings in possession of the family and preserved as records of family history. Of course, it was not incumbent upon the county attorney to inquire of the witness as to the sources of her knowledge. That he did so, thus invading, perhaps, the province of counsel for defendant, was not made the ground of objection.

4. Mrs. Frank Vinn, called by defendant, testified that her daughter was born on July 9, 1894, and that at the date of the alleged rape she was over the age of eighteen years. Several witnesses were called in rebuttal, who testified that on various occasions, prior and subsequent to the date of the offense, she had stated to them that the daughter was under eighteen years [6] of age. In this connection Alice O'Hara was called. She stated that she was the county superintendent of schools for

Fergus county. The county attorney then had her identify the school census for Fergus county, including that of the district in which the defendant resided. Her evidence otherwise tended to show that the record had been kept as required by law. It was then admitted in evidence, over the objection of counsel for defendant, that it was hearsay. The ruling was proper. The document was a public record required by law to be kept by this officer. (Par. 3, sec. 512, Chap. 76, Laws 1913.) It was admissible as *prima facie* evidence of the facts therein stated. (Rev. Codes, sec. 7926; *Hedrick v. Hughes*, 15 Wall. 123, 21 L. Ed. 52; *Levels v. St. Louis etc. Ry. Co.*, 196 Mo. 606, 94 S. W. 275.)

5. In paragraph 4 of the charge the jury were instructed that [7, 8] the evidence of the prosecutrix alone, if believed by them, was sufficient to sustain a conviction. Counsel contend that this was error, in that the court omitted to charge also that the jury should consider the testimony in connection with the other evidence in the case, and give it such weight as they then thought it entitled to. While we agree with counsel that, upon proper request, the court ought to have formulated the instruction to meet his views, since no such request was made, and since the instruction was correct so far as it went, there is no ground for complaint. "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason." (Rev. Codes, sec. 7861.) The rule applies to the evidence of a prosecutrix in a rape case as well as to witnesses in other cases (*State v. Peres, supra*), though a different rule prevails in other jurisdictions. In another paragraph of the charge the court instructed the jury fully as to how they should weigh and credit the evidence of the different witnesses. In the absence of a request for a special precautionary instruction, this was sufficient to meet all requirements.

6. Finally, it is contended that the verdict is contrary to the evidence. It is true that the mother contradicted the daughter as to her age, and that the defendant denied that he had ever had sexual intercourse with her. As already noted, there was

testimony showing that the mother on different occasions stated the age of her daughter to be as the latter testified, and also that she had admitted to at least two persons that she had knowledge that her husband had had sexual relations with her daughter. The daughter's evidence was sufficient to make a case for the jury. As we have so often said, it is the province of the jury [9] to solve all questions as to the credibility of the different witnesses, and with their conclusion thereon we may not interfere.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER concurs.

MR. JUSTICE HOLLOWAY did not hear the argument, and takes no part in the foregoing decision.

CASES DETERMINED
IN THE
SUPREME COURT

AT THE

DECEMBER TERM, 1914.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY, }
THE HON. SYDNEY SANNER, } Associate Justices.

KINSMAN, APPELLANT, v. STANHOPE, RESPONDENT.

(No. 3,427.)

(Submitted November 10, 1914. Decided December 1, 1914.)

[144 Pac. 1083.]

*Conversion — Counterclaim — Novation — Written Contracts —
Change in — Parol Testimony — Inadmissibility — Chattel Mort-
gages — Power of Sale — Who may Sell Property.*

Conversion—Showing Necessary by Plaintiff.

1. In an action for damages for conversion, plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary, and must show a general or special ownership in and the right to immediate possession of the property at the time of the taking by defendant.

[As to title on which trover is maintainable, see note in 1 Am. Dec. 585.]

Same—Counterclaim—Purchase Price.

2. Defendant, who was sued for the conversion of an automobile taken under a chattel mortgage given him to secure the purchase price, could properly counterclaim for the balance of the purchase price.

Novation—Definition.

3. Novation results by the substitution of a new obligation for another, with intent to extinguish the old one.

What Does not Constitute Novation.

4. *Held*, under the rule above, that where plaintiff purchased an automobile from defendant giving a chattel mortgage to secure the unpaid purchase money, a subsequent agreement that plaintiff should run the automobile for hire and turn over to defendant all moneys received until the balance due on the purchase price should be fully paid, did not work a novation.

[As to waiving tort and suing in *assumpsit*, see note in *Ann. Cas.* 1913D, 231.]

Written Contracts—Change in—Parol Testimony—Inadmissibility.

5. Under section 5087, Revised Codes, an agreement resting in parol and not fully executed could not alter a prior written contract, and was therefore properly excluded from evidence.

Chattel Mortgages—Foreclosure—Power of Sale.

6. Under section 5742, Revised Codes, providing that a power of sale may be conferred by a mortgage upon the mortgagee or any other person, the mortgagee may execute the power without calling upon the sheriff to make the sale, such officer not being given exclusive power.

'Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by James H. Kinsman against L. H. Stanhope. From a judgment for defendant and an order denying new trial, plaintiff appeals. Affirmed.

Mr. W. A. Jackson and *Mr. A. C. McDaniel*, for Appellant, submitted a brief; *Mr. Jackson* argued the cause orally.

The appellant takes the position that the counterclaim must arise out of the transaction set forth in the complaint, or be connected with the subject of the action, and that the counterclaim here does not fall within either provision of section 6541, Revised Codes. (See *Collier v. Ervin*, 3 Mont. 142; *Osmers v. Furey*, 32 Mont. 581, 81 Pac. 345; *Davis v. Frederick*, 6 Mont. 300, 12 Pac. 664.)

The complaint is in tort, the counterclaim in contract; hence, the counterclaim cannot fall within section 6541. A claim for the use and occupation of land wrongfully taken from the possession of claimant and for the conversion of personalty cannot be used as a setoff against a mortgage. (*Rogers v. Watson*, 81 Tex. 400, 17 S. W. 29.) Where the complaint charges the wrongful conversion of the proceeds of goods sold by defendant on commission, the tort is the subject of the action, and sole

foundation of the plaintiff's claim. (*Scheunert v. Kaehler*, 23 Wis. 523; see, also, *Tallman v. Barnes*, 54 Wis. 181, 11 N. W. 478; *Moyle v. Porter*, 51 Cal. 639.) In an action for taking and carrying away certain goods, the defendant set up in his answer that he held a chattel mortgage on the goods, and that default having been made, he took possession of the goods, but that plaintiff had previously secreted and removed part of the same; that it was afterward discovered that the plaintiff did not own part of the goods taken by the defendant, and that they were taken away from the defendant by the real owner, whereby he sustained loss to a specified amount for which amount he demanded judgment. It was held that as the proposed counterclaim was not connected with the trespass upon which the plaintiff relied and did not arise out of the transaction set forth in the complaint, it was not admissible. (*Chamboret v. Cagney*, 10 Abb. (n. s.) 31, 41 How. Pr. 125.)

The counterclaim does not state facts sufficient to constitute a cause of action; it affirmatively shows that the defendant did not comply with section 5769, Revised Codes. The point made by appellant is that the sheriff is the only person who can sell mortgaged personal property, and that the mortgagee has no such right. The mortgagor may confer on the mortgagee the power to sell, but the sheriff only can execute that power. Counsel for appellant have been unable to find a statute from another state similar to section 5769. The statute of Idaho is different from that of Montana, but the case of *Rein v. Callaway*, 7 Idaho, 634, 65 Pac. 63, may be cited with propriety here.

The court erred in sustaining the objection of defendant to the introduction by plaintiff of evidence of discharge of note and mortgage, and in sustaining objection to the offer of proof of same. It was not the purpose of the plaintiff at the trial to prove the alteration of a written agreement by parol evidence, but to prove the substitution of one contract for another, the second contract taking the place of the first contract and entirely annulling it. This may be done whether the second contract was written or oral. This is what was alleged in the reply and what

was offered to be proved at the trial. In other words, a contract may be discharged by a new contract taking the place of the first contract. The present case is not one of alteration, but of novation, the substitution of one contract for another, the discharge of one contract by a subsequent contract. (*Adler v. Friedman*, 16 Cal. 138; *Sutter v. Moore Inv. Co.*, 30 Wash. 333, 70 Pac. 746; *Bryant v. Thesing*, 46 Neb. 244, 64 N. W. 967; *Illinois Life Ins. Co. v. Benner*, 78 Kan. 511, 97 Pac. 438; *Pennsylvania Min. Co. v. Brady*, 14 Mich. 260, 16 Mich. 332; *Bandman v. Finn*, 185 N. Y. 508, 12 L. R. A. (n. s.) 1134, 78 N. E. 175; *White v. Walker*, 31 Ill. 422; *Pecos Valley Bank v. Evans etc. Co.*, 107 Fed. 654, 46 C. C. A. 534.)

Mr. Lewis A. Smith, for Respondent, submitted a brief, and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In April, 1910, James H. Kinsman purchased an automobile from L. H. Stanhope, for which he paid \$1,000 in cash, and executed his note, secured by a chattel mortgage upon the machine, for the balance, amounting to \$1,700. The chattel mortgage contained the usual provisions authorizing the mortgagee to take possession in case of default in the payment of the note or the happening of any one of three or more other contingencies. In the complaint in this action the plaintiff alleges his ownership of the automobile, his right to the possession of it, and that defendant wrongfully took and converted it to his own use, to plaintiff's damage in the sum of \$2,700. The answer consists of a general denial, an affirmative defense in which defendant justifies the taking and selling of the machine under the chattel mortgage for default in the payment of the note, and finally a counterclaim for the balance due on the purchase price of the machine. By reply the plaintiff admits the execution and delivery of the note and chattel mortgage, and that no part of the note has been paid. He then alleges that, on the same day the

note and mortgage were executed, and after the delivery thereof, he and defendant entered into a new agreement, by the terms of which defendant undertook to pay the running expenses, repairs and garage charges of the automobile in question, and to pay plaintiff's living expenses, in consideration that plaintiff should employ the automobile in rent service and turn over to the defendant all moneys so received until the \$1,700, balance upon the purchase price, should be fully paid. He alleges that he entered upon the performance of this new agreement and paid over to the defendant \$754 pursuant to its terms; that he was thereafter ready and willing to continue such performance, but that defendant, about June 25, 1910, refused further performance on his part, and refused to permit plaintiff to proceed. At the trial plaintiff offered evidence of his ownership of the automobile, its seizure and sale by the defendant, and his resulting damages. Defendant offered evidence of his seizure and sale of the machine under the chattel mortgage and of the balance due him upon the purchase price. In rebuttal, plaintiff offered to prove the subsequent agreement set forth in his reply, but when he admitted that such agreement was in parol, the court excluded the offered evidence and directed a verdict in favor of the defendant for the amount of his counterclaim, and judgment followed accordingly. Plaintiff has appealed from the judgment and from an order denying him a new trial.

1. It is insisted that, since the plaintiff's action for damages for conversion sounded in tort, a counterclaim for the balance of the purchase price founded in contract and which, it is further contended, does not arise out of the transaction set forth in the complaint, and is not connected with the subject of plaintiff's action, is not such a counterclaim as is permitted by section [1] 6541 of the Revised Codes. In an action for damages for the conversion of personal property, plaintiff "must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary." (*Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884.) It is incumbent upon him to show a general or special ownership in the chattel and a right to its immediate

possession at the time of the taking by the defendant. (*Glass v. Basin & Bay State Min. Co.*, 31 Mont. 21, 77 Pac. 302.) To meet the requirements of these rules, plaintiff alleges that, at the time the defendant seized the automobile, he (plaintiff) was "in the immediate possession of, and entitled to the possession of, said property"; but the admissions in his reply amplify his former pleading, so that, in effect, his complaint charges that, at the time defendant seized the automobile, plaintiff was entitled to the possession of it by virtue of his purchase of it from the defendant pursuant to the terms of the sale agreement.

[2] Since plaintiff's right of possession depended upon his purchase of it, and his right to the possession was a necessary part of his right of action, it would seem to follow that the purchase of the automobile was a part of the transaction set forth in plaintiff's complaint as modified by the admissions in his reply, and that the defendant's counterclaim for the balance of the purchase price arose out of the same transaction, or, at least, was connected with the subject of the action. The question at issue was which party, plaintiff or defendant, was entitled to the possession of the automobile at the time defendant seized it. Under like circumstances, and construing a statute identical with section 6541, subdivision 1, above, the supreme court of New York held, in an action for damages for the conversion of a note and collateral security, that defendant might counterclaim for the balance due on the note. (*Empire Dairy Feed Co. v. Chatham Nat. Bank*, 30 App. Div. 476, 52 N. Y. Supp. 387.) Upon principle, the decision of this court in *Scott v. Waggoner*, 48 Mont. 536, 139 Pac. 454, is conclusive in favor of the validity of this counterclaim.

2. Plaintiff contended in the trial court, and contends here, that the subsequent agreement entered into on the same day the note and mortgage were executed and delivered worked a novation of the original obligation represented by the note and mortgage, and that such new agreement may be shown, even though it rests in parol and has not been fully executed. The question still [3, 4] remains: Was there a novation? "Novation is the sub-

stitution of a new obligation for an existing one." (Rev. Codes, sec. 4958.) "Novation is made: 1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation. * * * " (Sec. 4959.) It is to be observed that novation does not result from the substitution of one paper writing for another, or one evidence of debt for another, or one contract for another, but only by the substitution of a new obligation for another with intent to extinguish the old one. "An obligation is a legal duty, by which a person is bound to do or not to do a certain thing." (Sec. 4892.) The note and mortgage executed contemporaneously are to be treated as one agreement. Now, the legal duty (obligation) owed by plaintiff to defendant was to pay the debt represented by the note and to hold the machine as security until such payment should be made. There is not even a contention that by the new agreement this debt was extinguished, but, on the contrary, the existence of the same debt is alleged under the new agreement, the only effect of which was to change the time and manner of its payment. Novation, as defined by section 4959, subdivision 1, above, is of civil-law origin. (1 Parsons on Contracts, 217.) In his treatment of the subject from the standpoint of the civil law, Pothier says: "So if, subsequent to the contracting of a debt, some act passes between the debtor and creditor, allowing a further time, or appointing a different place for payment, or authorizing a payment to some other person than the creditor, or agreeing to take something else in lieu of the sum due, or by which the debtor engages to pay a larger sum, or the creditor to accept a smaller, in these and similar cases, according to the principle that a novation is not to be presumed, it should be decided that no novation had taken place, and that the parties intended only to modify, augment, or diminish, the obligation, and not to extinguish the old debt, and substitute a new one, unless the contrary is particularly expressed." (1 Pothier on Obligations, 439.)

In *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401, 5 South. 120, it is said: "A 'novation,' under the rules of the civil

law, whence the term has been introduced into the modern nomenclature of our common-law jurisprudence, was a mode of extinguishing one obligation for another—the substitution, not of a new paper or note, but of a new obligation, in lieu of an old one, the effect of which was to pay, dissolve, or otherwise discharge it.”

Our conclusion is that novation was not effected by the transaction pleaded, but that the new agreement merely tended to modify the prior written contract represented by the note and mortgage in respect to the time and manner of payment and the character of security; and since such subsequent agreement [5] rested in parol, and was not fully executed, it was impotent for the purpose intended; for section 5067, Revised Codes, provides: “A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.”

3. There is some contention that a mortgagee cannot execute the power of sale conferred by a chattel mortgage, but must call [6] upon the sheriff to make the sale, or proceed by an action to foreclose, but there is not any merit in this. Section 5742, Revised Codes, which applies to chattel mortgages, provides: “A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security.” The provision for calling upon the sheriff to execute the power of sale does not confer exclusive power upon such officer. (*Kerr v. Blaine*, 49 Mont. 602, 144 Pac. 566.)

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STRITZEL-SPABERG LUMBER CO., APPELLANT, v.
EDWARDS ET AL., RESPONDENTS.

(No. 3,428.)

(Submitted November 11, 1914. Decided December 1, 1914.)

[144 Pac. 722.]

Mechanic's Lien — Extent — Removal of Structure — Statute — Liberal Construction.

Mechanic's Lien—Extends to What.

1. The lien given by section 7290, Revised Codes, to mechanics and materialmen, attaches primarily to the structure in the erection of which the labor or materials were used, and extends only incidentally to the land upon which it is situated.

[As to buildings and other property subject to mechanics' liens, see note in 78 Am. Dec. 694.]

Same—Removal of Structure—Right of Lienor.

2. A lumberman was not deprived of his lien upon a building for the erection of which he had furnished materials, by failure of title in the owner of the lot upon which it stood, prior to foreclosure; he was entitled to a decree foreclosing the lien, with the right to remove the building within the time allowed by law, whether injury to the realty resulted thereby or not.

Same—Statute—Liberal Construction.

3. After the necessary statutory steps toward securing a mechanic's or materialman's lien have once been taken, the lien law is subject to the most liberal construction.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

ACTION by the Stritzel-Spaberg Lumber Company against William Edwards and others. From a judgment for defendant Esau James, plaintiff appeals. Reversed and remanded.

Cause submitted on briefs of counsel.

Mr. A. J. Lowary, for Appellant.

Messrs. Logan & Child, for Respondents.

The lien claimed by plaintiff could, under section 7293, Revised Codes, extend only to such interest as Edwards might have had in the land. This right was the right to a deed upon the making of stipulated payments upon his part and to possess-

sion until default. Having failed to make these payments and his right being foreclosed, there was nothing left, at least as far as the land was concerned, against which a lien would lie. Such is the holding in *Pelton v. Minah Consolidated Min. Co.*, 11 Mont. 281, 28 Pac. 310; *Alaska Plumbing Co. v. Bingham*, 58 Or. 506, 115 Pac. 159, and by inference, at least, in the Montana cases hereinafter cited.

The further question then arises: Will the lien lie upon the building into which the material goes where the building is of such a character as in this case that it could not be removed without the destruction of the building and injury to the freehold? It is an open question in this state, so far as we know, whether under the circumstances of this case, the building could be removed even if removable without material injury to the freehold. The court will notice that section 2794 specifically provides in the case of a leasehold for the removal of the buildings and the natural inference would be that the legislature, had it intended that the building might be removed in cases other than a leasehold where the interest was less than a freehold, would have so stated. It is not necessary to argue that question at this time because the building in this case was not of such a character, it being a stone building, which, of course, could not be removed except stone by stone and with great injury to the freehold, and this court has held that even in leasehold estates where the right to removal is specifically given, the lien could only be enforced where the building was of such a character as to be removable. (See *Stenberg v. Liennemann*, 20 Mont. 457, 63 Am. St. Rep. 636, 52 Pac. 84; *Missoula Mercantile Co. v. O'Donnell*, 24 Mont. 65, 60 Pac. 594, 991.)

We do not think there is any question but that the lienor in this case might have foreclosed and sold any interest which Edwards may have had in this land. For instance, so long as Edwards was entitled to possession before default, that right of possession or occupancy might have been sold. The lienor would have had the right to pay the purchase price, take a deed to the property or whatever other valuable right Edwards may

have had in this property, the lienor could have subjected to the satisfaction of his debt, but this right could be exercised only so long as Edwards had an interest in the property, but was lost when Edward's equity was foreclosed. (See *Grand Opera House Co. v. Maguire*, 14 Mont. 558, 37 Pac. 607.) Edwards having been dispossessed prior to the foreclosure of the lien, all right under the lien was also lost. We cite *Belnap v. Condon*, 34 Utah, 213, 23 L. R. A. (n. s.) 601, 97 Pac. 111, and particularly the cases cited there upon this question; also the note to the case of *Zabriskie v. Greater America Exposition Co.*, 67 Neb. 581, 2 Ann. Cas. 687, 62 L. R. A. 369, 93 N. W. 958.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1910 J. L. McIntire, who owned a certain town lot in Polson, contracted to sell it to J. H. Campbell, who thereafter entered into a contract to sell the same lot to William Edwards. Edwards went into possession under the contract and erected a building upon the lot. The Stritzel-Spaberg Lumber Company furnished materials to Edwards for the building, and, not having been paid, filed its materialman's lien. Shortly before the lien was filed, Edwards defaulted in the payment for the lot, and Campbell and McIntire then sold it to Esau James, who commenced an action to dispossess Edwards, and that action was pending at the time this suit to foreclose the lien was instituted by the lumber company. Edwards and McIntire failed to appear. Defendant James answered, setting forth the facts above somewhat more in detail. The trial court made findings in substantial conformity with these recitals, and, in addition, found "that the said building constructed upon the premises in question cannot be removed therefrom without injury to the realty," and concluded "that defendant William Edwards' interest in and to the premises herein involved was not such that any lien for materials used in the construction of said dwelling-house could attach." Judgment for defendant James was ren-

dered and entered, and plaintiff appealed therefrom and from an order denying it a new trial.

That Edwards was in possession of, and had an equitable interest, in the lot at the time he contracted for the building materials, and throughout the entire time during which the materials were furnished, cannot be gainsaid. Does the fact, then, that he had but a defeasible interest in the lot, and that such interest failed before the lien was foreclosed, but after the materials were furnished, operate to defeat the lien altogether? The identical question is somewhat new in this state, but upon principle it cannot be of doubtful solution. Section 7290, Revised Codes, gives to the lumberman a lien upon *the property* for materials furnished for any building, structure, improvement, *etc.* In the lien notice he is required to give a description of *the property* to be charged with such lien. (Section 7291.) Section 7293 provides that the lien extends to the whole lot or lots upon which the building or improvement is situated, if within a city or town, provided the land belongs to the person who causes the building to be constructed; but if such person has less than a fee-simple estate in such land, then only his interest therein is subject to the lien. It is argued that, since Edwards' interest in the lot wholly failed before the lien was foreclosed, there was not anything which a decree of foreclosure could direct to be sold. The argument of counsel and the conclusion of the trial court apparently proceed upon the assumption that the lien given by section 7290, above, attaches exclusively, or at least primarily, to the land upon which the building is erected, and therefore, without some title to the land in the one who purchases the material, there cannot be a lien. We are of the opinion that the assumption is not justified, but that, on the contrary, the lien is given primarily upon the building, structure, or other improvement, and extends to the land incidentally. That this is correct seems to be borne out by the terms of the statute and its history. In the Compiled Statutes of 1887 the lien was given in terms upon the building, erection, bridge, flume, canal, ditch, *etc.* (Sec. 1370, Fifth Div., Comp. Stats.)

Section 1374 provided that the lien given by section 1370 extended to the lot or land upon which the building, improvement or structure was situated, but only to the extent of the right, title or interest owned therein by the owner or proprietor of such building; and if the interest was a leasehold, the forfeiture of the lease did not forfeit or impair the lien so far as concerned the building, erection or other improvement, but such building, erection or other improvement might be sold to satisfy the lien, and removed by the purchaser within twenty days after the sale. (Sec. 1375.) In case the building subject to the lien was upon land encumbered by a prior mortgage, the lien might be enforced against the building, with the right in the purchaser to remove it. (Sec. 1376.) This was the state of the law at the date of its codification. Section 2130 of the Code of Civil Procedure of 1895 granted a lien to a materialman, and corresponded in its provisions to section 1370 of the Compiled Statutes, above. However, instead of the lien attaching to the building, erection, bridge, flume, canal, *etc.*, in terms, as under the Compiled Statutes, the Code of Civil Procedure granted the lien upon "the property upon which the work or labor is done, or material furnished," and this phraseology has been carried forward into the Revised Codes (sec. 7290, above).

By comparison it is found that the legislature of 1895 adopted the lien law as prepared by the Code commissioners, and in their report the commissioners said: "There have been no material changes made by the commissioners in the proposed Code of Civil Procedure from existing statutes, except to arrange, perfect, classify and consolidate the law." So the commissioners understood, and the legislatures must have understood, that the change in the phraseology in the lien law as indicated above was not intended to work any change in substance, but that the term "property" was used in its generic sense to avoid repeating the long list of terms "building, erection, bridge, flume, canal, ditch," *etc.*, which terms were all repeated specifically in the then existing statute. (Sec. 1370, Comp. Stats., above.) Added emphasis is given to this construction by the fact that the Code

commissioners and the legislature of 1895 followed closely all the other provisions of the Compiled Statutes upon liens, and, with few changes, these same provisions are now to be found in our present Codes. A comparison of sections 1374, 1375 and 1376, Compiled Statutes, with sections 1331, 1332 and 1333, Code of Civil Procedure, as reported by the commissioners, and sections 2133, 2134 and 2135, Code of Civil Procedure as adopted in 1895, and sections 7293, 7294 and 7295, Revised Codes, will demonstrate the correctness of this conclusion. These views are in harmony with our former holding in *Western Iron Works v. Montana P. & P. Co.*, 30 Mont. 550, 77 Pac. 413, where it was said: "By section 2130 of the Code of Civil Procedure, a lien is given upon the *building or improvement*, in the construction of which the labor or materials were used, and section 2133 of the Code of Civil Procedure *extends* this lien to the *land* upon which the structure or building is situated. Therefore the 'property' to be identified under section 2131 of the Code of Civil Procedure is the building or improvement upon which the lien is given."

If, then, the lien of this plaintiff attached primarily to the building in the construction of which its materials entered, the failure of Edwards' title to the lot upon which the building was situated did not affect the lien upon the building. At the time the materials were furnished and the lien was filed, Edwards had an equitable interest in the lot and was in actual possession of it. His default in the payment of the installment of the purchase price due before the lien was filed did not *ipso facto* work a forfeiture of such interest. While the right to a lien is purely statutory, and compliance with the statute is necessary to the [3] existence of a lien (*McGlaufflin v. Wormser*, 28 Mont. 177, 72 Pac. 428), the necessary steps once having been taken, the lien law is subject to the most liberal construction; for it is remedial in character, and rests upon the broad principle of natural equity and commercial necessity. (*Western Iron Works v. Montana P. & P. Co.*, above.)

The fact that some injury may result to the realty from the removal of the building is not a reason for denying plaintiff relief. The statute contemplates removal, whether injury does or does not result. Upon the showing made, plaintiff was entitled to a decree foreclosing its lien upon the building, with the right in the purchaser to remove the same within the time allowed by law.

The judgment and order are reversed, and the cause is remanded, with directions to enter a decree in favor of plaintiff in conformity with the views herein expressed.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

GALLATIN COUNTY, RESPONDENT, v. UNITED STATES
FIDELITY & GUARANTY CO., APPELLANT.

(No. 3,415.)

(Submitted October 26, 1914. Decided December 3, 1914.)

[144 Pac. 1085.]

Statute of Limitations—Official Bonds—Suretyship—Nature of Undertaking.

Official Bonds—Suretyship—Nature of Undertaking.

1. *Held*, under *City of Butte v. Goodwin*, 47 Mont. 155, that the liability of a surety on an official bond is not founded upon an "instrument in writing"—the contract of suretyship—in the sense in which that term is used in section 6445, Revised Codes, limiting to eight years the time within which an action "founded upon an instrument in writing" may be brought.

Same—Action on—Statute of Limitations.

2. The duty of a county treasurer to receive, keep safely and account for all moneys of the county as well as those directed by a court or statute to be deposited with him for safekeeping, is one imposed by express statutory requirement (Rev. Codes, sec. 2986); hence an action on the official bond of such an officer is on "a liability created by statute" which is barred in two years by subdivision 1 of section 6449, Revised Codes.

MR. JUSTICE SANNER dissenting.

[As to liability of sureties on bonds of officers after expiration of term of office, see note in 103 Am. St. Rep. 932.]

Appeal from District Court, Gallatin County; Geo. W. Pierson, a Judge of the Thirteenth Judicial District, presiding.

ACTION by Gallatin County against the United States Fidelity & Guaranty Company. From a judgment for plaintiff, defendant appeals. Reversed.

Messrs. Gunn, Rasch & Hall, for Appellant, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

In practically every state where the question has been raised the courts have held that an action on an official bond to recover public funds received by an officer and appropriated by him under statutes similar to ours is "an action upon a liability created by statute other than a penalty or forfeiture," and is barred when not commenced within the time named in such statute. See *County of Sonoma v. Hall*, 132 Cal. 589, 62 Pac. 257, 312, which case was also considered by the court *in banc* in 65 Pac. 12, 459, where the former opinion was affirmed and the court expressly overruled the earlier case of *Placer County v. Dickerson*, 45 Cal. 12. (See, also, *People v. Van Ness*, 76 Cal. 121, 18 Pac. 139. *County of Sonoma v. Hall*, above, was followed in *United States v. Azman*, 152 Fed. 816; *State v. Davis*, 42 Or. 34, 71 Pac. 68, 72 Pac. 317; *Multnomah County v. Kelly*, 37 Or. 1, 60 Pac. 202; *People v. Putnam*, 52 Colo. 517, Ann. Cas. 1913E, 1264, 122 Pac. 796; *Ryus v. Gruble*, 31 Kan. 767, 3 Pac. 518; *Ada County v. Ellis*, 5 Idaho, 333, 48 Pac. 1071; *Board of County Commrs. v. Van Slyck*, 52 Kan. 622, 35 Pac. 299; *Davis v. Clark*, 58 Kan. 454, 49 Pac. 665; *Board of Commissioners v. Hostetler*, 6 Kan. App. 286, 51 Pac. 62; *Hawk v. Saylor Co.*, 83 Kan. 775, 112 Pac. 602; *Spokane County v. Prescott*, 19 Wash. 418, 67 Am. St. Rep. 733, 53 Pac. 661; *McClaine v. Rankin*, 197 U. S. 154, 3 Ann. Cas. 500, 49 L. Ed. 702, 25 Sup. Ct. Rep. 410.)

Mr. D. M. Kelly, Attorney General, and *Mr. W. H. Poorman*, Assistant Attorney General, submitted a brief; *Mr. Poorman* argued the cause orally.

It was contended in the district court that the facts of the present case are substantially different from the facts in the *Goodwin Case*, and on this point we can do no better than to

quote from the brief submitted to that court by Mr. George Y. Patten, counsel for plaintiff: "It is respectfully submitted that the facts here are so far different from the facts in the *Goodwin Case* as to constitute an entirely different form of action, and hence require a different application of the statute of limitations. In the *Goodwin Case* the action was for the recovery of the city in an equitable action against the city treasurer of the secret profits from trust funds—that is, the interest received by Goodwin on the city funds in his possession while city treasurer.

• • •

"The decision follows and seems to be based upon the decision of the supreme court in *Schaeffer v. Miller*, 41 Mont. 417, 109 Pac. 970, which was an equitable action to recover money advanced on the purchase price of real property where the negotiations failed and where it was held that notwithstanding there was no agreement between the parties, that the defendant was to return the money so advanced, yet equity and good conscience required him to do so, and the law implied a promise on the part of the defendant so to do. In the *Schaeffer Case* the obligation was held to be a *quasi* contract, a contract implied by law or a constructive contract. In other words, in both the *Goodwin* and the *Schaeffer Cases* the obligation was held to be not one arising out of an express promise made by the party to be charged, but to arise out of a promise which the law made for such party. • • •

"The majority opinion further holds that notwithstanding the action is on the bond of a public officer, the obligation to be enforced is that which would exist outside of the bond and for the performance of which the bond is only a collateral security, and therefore concludes that inasmuch as the action there was upon an implied promise, it was an action upon an obligation or a liability not founded upon an instrument in writing other than a contract, account or promise, and that under subdivision 3 of section 6447 of the Revised Codes, the action should have been commenced within three years. The result, therefore, of that case is that in order to determine the period of limitation

applicable, we must look to the nature of the obligation of the principal which lies back of the bond and for which the bond is security. The question, therefore, is as to whether the obligation of Weaver as county treasurer of Gallatin county to return intact the funds intrusted to him was the same as that of Goodwin to account for the interest on the public funds which he had in his possession—in other words, whether there is an implied promise only or a true and express promise on the part of a county treasurer to account for and pay over to his successor the public funds which he has in his possession.

“In the case of a county treasurer not only is there the implied obligation to return that which he receives, which promise the law creates for him, but by section 2976 of the Revised Codes he is required to give a bond, and by section 384 of the Revised Codes the condition of every official bond must be that, among other things, he will “account for, and pay over and deliver to the person or officer entitled to receive the same, all moneys or other property that may come into his hands as such officer.” The last section cited also provides that all official bonds must be signed and executed by the principal as well as by the sureties. Thus, in the case of a county treasurer the law requires that he enter into an express promise in writing to account for and pay over to his successor the moneys in his hands as such officer at the close of his term. And no recourse is necessary to the doctrine of implied promises to create such obligation on his part. It is therefore apparent that the obligation sued upon is an express contract in writing.

“The view here contended for seems to be fully sustained by the decision of the supreme court of Washington in the case of *Spokane County v. Prescott*, 19 Wash. 418, 67 Am. St. Rep. 733, 53 Pac. 661, cited by this court in the *Goodwin Case*. There the court holds, as does this, that the bond is merely collateral security, and that the obligation to be enforced is that which exists by reason of the statutory duty of the county treasurer to pay over county funds to his successor. * * *

"The question in that case was whether the action was upon a contract in writing or liability, express or implied, arising out of a written instrument, or was an action upon a contract or liability, express or implied, which is not in writing and does not arise out of any written instrument. The court held that it fell in the latter class. In the later case of *Skagit County v. American Bonding Co.*, 59 Wash. 1, 109 Pac. 197, the supreme court of Washington said in referring to the *Prescott Case*: "The construction of the statute adopted by this court in the *Prescott Case* was a liberal one in favor of the defaulting officer. We do not desire to extend the doctrine there announced by any more liberal construction in favor of the appellant here."

"It is therefore submitted that the reasoning of the *Goodwin Case*, being the same as that in the *Prescott Case*, when applied to the facts in this case, which are identical with those of the *Prescott Case*, would lead to the same conclusion as that arrived at in the *Prescott Case*—that the action here, if not upon a contract in writing, is at least upon a contract not in writing, and that therefore the least period of limitation applicable would be the period of five years. Such a result would in no wise conflict with the holding of our supreme court in the *Goodwin Case*, because of the conclusion that the facts there did not show a true contract but simply a promise created by law."

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Jacob B. Weaver was county treasurer of Gallatin county for the term of two years beginning on the first Monday in March, 1907, and ending on the same day in March, 1909. The defendant was surety on his official bond. Subsequent investigations of the accounts of the office disclosed that there was a shortage in the cash paid over by Weaver to his successor of \$2,000. This discovery was made a short time previous to the bringing of this action on February 21, 1913. The purpose of the action is to recover the amount of the shortage, with interest. The defendant in its answer pleaded as defenses two provisions of the

statute of limitations, viz., subdivision 3 of section 6447, and subdivision 1 of section 6449 of the Revised Codes. A reply was filed denying that the action was barred by either of these provisions. The cause was submitted to the court without a jury upon an agreed statement of facts, showing that Weaver had failed to account for, and pay over to his successor, the sum of \$2,000, as alleged, and that his successor's term of office began on the first Monday in March, 1909. The only question submitted for decision was whether, upon the admitted facts, the plaintiff's right of action was barred by either of the provisions of the statute pleaded. The court decided in favor of the plaintiff, and rendered judgment accordingly. The defendant has appealed.

1. The theory of the trial court was that, in so far as the surety on an official bond is concerned, his liability is created by [1] the written contract of suretyship, and hence that his liability for the default of his principal in the performance of any of his official duties is subject to the limitation of eight years, as prescribed by section 6445 of the Revised Codes. It is said by the attorney general in his brief: "The only relation existing between the bondsmen and the state (the obligee) is by virtue of this written instrument. It is this instrument, rather than the implied duty of the officer, that is looked to to determine the liability of the bondsmen. If the fact that the officer has defaulted is established, the written instrument is then called in evidence to establish the liability of the bondsmen." Starting with this general statement, he argues that, the liability of the surety being determined exclusively upon the written obligation, it is different from that incurred by the principal by his assumption of the office, and is based upon contract. The same contention was made in the case of *City of Butte v. Goodwin*, 47 Mont. 155, Ann. Cas. 1914C, 1012, 134 Pac. 670. It was expressly overruled; the court holding that the liability of the surety is concurrent with that of his principal, and is not extended or enlarged by the fact that the principal himself signed the obligation. The court said: "Goodwin's failure to sign the

bond would not have vitiated it or lessened his liability, and, if he had not signed the bond, there cannot be any question that the action against him would have been barred in three years, and, if barred as to the principal, it would have been barred as to the sureties, notwithstanding they had signed the bond (*State v. Kelly*, 32 Ohio St. 421; *Ryus v. Gruble* [31 Kan. 767, 3 Pac. 518], above; *State v. Conway* [18 Ohio, 234], above); for the bond is not a contract in the strict sense of the term. It is a sort of vicarious undertaking—a collateral security for the faithful performance of official duty. (*County of Sonoma v. Hall*, 132 Cal. 589, 62 Pac. 257 [65 Pac. 12, 459]; *State v. Davis*, 42 Or. 34, 71 Pac. 68 [72 Pac. 317]; *Walton v. United States*, 9 Wheat. (U. S.) 651, 6 L. Ed. 182.” The court also said: “The obligation sued on is not founded upon any instrument in writing, but rests altogether upon the rule of law which makes the promise for the trustee that he will account for and pay over all the earnings of the trust fund while in his possession, and the cause of action arises upon a breach of the duty thus imposed by law.” The result of this case, therefore, is that, in order to determine which provision of the statute applies, attention must be given to the nature of the obligation of the principal which lies back of the bond, for the performance of which the bond is security. Being satisfied, after further consideration, that the conclusion reached in that case that the liability assumed by the sureties is not founded upon the written instrument, in the sense in which this expression is used in section 6445, *supra*, we follow it as a determination adversely to the contention made by the attorney general in this behalf.

2. It remains to inquire whether the action is upon “an obligation or liability, not founded upon an instrument in writing, other than a contract, account, or promise,” which is barred in three years by subdivision 3 of section 6447, *supra*, or upon “a liability created by statute other than a penalty or forfeiture,” which is barred in two years by subdivision 1 of section 6449.

If it be assumed that Weaver's duty to account for the moneys coming into his hands rested merely upon a promise implied by law, the case of *City of Butte v. Goodwin* directly sustains the conclusion that the limitation of three years applies. On the other hand, if the duty to account is an express statutory requirement, then the shorter limitation applies. The general duties of a county treasurer are prescribed by section 2986 of the Revised Codes. Among them is to receive and keep safely all moneys of the county, and all others directed by law to be paid to him, and to apply and pay them out, rendering an account therefor as required by law. By section 2976 he is required to give an official bond. One condition of this bond must be "that he will account for and pay over and deliver to the person or officer entitled to receive the same, all moneys or other property that may come into his hands as such officer." (Rev. Codes, sec. 384.) The bond must be signed by the principal and sureties. It will be noted that the treasurer is the fiscal agent of the county, made such by the Constitution. His duties are specifically defined and declared by the statute. The obligation to account for all moneys coming into his hands by virtue of his office is imposed upon him by the express provision of the statute and his official bond, as is also the duty to give his official bond. Whatever contrariety of opinion may exist upon the question whether his duty to account for interest he may receive upon moneys put to profitable use by him during his term of office is statutory or not, we think that the duty to account for and pay over the moneys paid directly to him by members of the public as revenue due the county, or directed by a court or by statute to be deposited with him for safekeeping, is clearly so, and that his liability for dereliction in this respect is a liability created by statute. And so it has generally been held by the courts.

In *People v. Van Ness*, 76 Cal. 121, 18 Pac. 139, was presented the question whether the liability of the commissioner of immigration for the state of California for fees provided for by the statute and unlawfully retained by him for his own use was a

liability created by statute. The court held that it was, and that a provision of the statute identical with ours *supra*, except that it prescribed a limitation of three years (Cal. Code Civ. Proc., sec. 338), was a bar to an action commenced after the expiration of the period of limitation prescribed therein.

In *County of Sonoma v. Hall*, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459, it was sought to charge a county recorder, and the surties upon his official bond, for fees which he was required by statute to collect for services performed by him in his official capacity and pay over to the county. The defendants having pleaded the statute, *supra*, it was held that the action was barred. The court said: "The fees that ought to have been collected are the legal fees, at the rate prescribed by statute. The duty of the defendant Hall to collect the fees with which it is sought to charge him being fixed by statute, the rate or amount of such fees being fixed by statute, * * * and the office which he held being the creation of the statute, we think this cause of action is upon a liability created by statute."

State v. Davis, 42 Or. 34, 71 Pac. 68, 72 Pac. 317, was an action against the defendant Davis, as clerk of the board of commissioners for the sale of school and university lands and the investment of funds arising therefrom, and the sureties upon his official bond, to recover moneys embezzled by Davis. The action was brought more than six years after the cause of action had accrued. Under a statute containing the same provision as that of California, except that the period of limitation was six years, it was held that the action was barred. After reference to cases decided by that court and by the court of California, the supreme court of Oregon said: "The theory upon which the adjudications proceed is the obvious fact that a bond or undertaking of a public officer creates no obligation in itself, but is in the nature of a collateral contract, simply furnishing a security against the neglect of duty or the dishonesty of the officer, and that an action thereon is for the breach of such duty, and therefore, in effect, although not in form, an action against the officer for misfeasance or nonfeasance in office, which, when barred as to him, is barred as to his sureties." To the same

effect is the case of *Multnomah County v. Kelly, Sheriff*, 37 Or. 1, 60 Pac. 202.

In Colorado it is held that an action against a sheriff for failure to account for fees above the amount of his salary is a breach of his statutory duty; that his liability, therefore, is created by statute; and that the provision of the Code of that state fixing the limitation for an action for such a breach of duty applies to an action against the sheriff and his sureties, the liability of the latter being concurrent with, and not greater than, that of the former. (*People v. Putnam*, 52 Colo. 517, Ann. Cas. 1913E, 1264, 122 Pac. 796.)

We content ourselves by notice of these cases which are directly in point. The following are cited as supporting, in principle, the rule, either directly or by clear analogy: *Ryus v. Gruble*, 31 Kan. 767, 3 Pac. 518; *McClaine v. Rankin*, 197 U. S. 154, 3 Ann. Cas. 500, 49 L. Ed. 702, 25 Sup. Ct. Rep. 410; *United States v. Axman* (C. C.), 152 Fed. 816; *Ada County v. Ellis*, 5 Idaho, 333, 48 Pac. 1071; *Board etc. v. Van Slyck*, 52 Kan. 622, 35 Pac. 299; *Ware v. State*, 74 Ind. 181; *Spokane County v. Prescott*, 19 Wash. 418, 67 Am. St. Rep. 733, 53 Pac. 661; *State v. Conway*, 18 Ohio St. 234.

Our attention has not been called to any case announcing a different rule. We therefore hold that the default of Weaver was a breach of duty imposed upon him directly by statute, and that his liability was created by statute. An action thereon was therefore barred both as to him and the defendant surety, by the lapse of two years, under subdivision 1 of section 6449, *supra*.

The judgment is reversed, with direction to the district court to dismiss the action.

Reversed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE SANNER: I dissent. There cannot, in my opinion, be any doubt that the instant case is within the precedent established by the majority of this court in *City of Butte v. Goodwin*, 47 Mont. 155, Ann. Cas. 1914C, 1012, 134 Pac. 670. I was unable, however, to assent to that decision, and I am unable to assent to this.

TYLER, RESPONDENT, v. TYLER ET AL., APPELLANTS.

(No. 3,436.)

(Submitted November 13, 1914. Decided December 8, 1914.)

[144 Pac. 1090.]

Husband and Wife—Dower—Right of Widow—Real Estate—Option Contracts—Escrow—Title—Doctrine of Relation.

Real Estate—Option—Escrow—Title in Whom.

1. Title to land which is the subject of an option contract and a deed to which is executed and deposited in escrow, accompanied by a part payment to be credited upon the purchase price, remains in the owner until delivery of the deed by the depository to the buyer.

[As to deeds delivered in escrow, see note in 53 Am. St. Rep. 555.]

Dower—Relinquishment—"Conveyance"—Definition.

2. A "conveyance" of land, within the meaning of section 3708, Revised Codes, by joining in which a widow will be held to have relinquished her right of dower in the realty, is one effective to transfer title at the time it is made.

Same—Right of Widow.

3. *Held*, under the above rules, that where a wife joined her husband in an option contract on land owned by the latter, executing and depositing a deed in escrow, and the husband died before the holders of the option exercised their right and received the deed from the depository, the widow was entitled to one-half of the net proceeds of such sale, in lieu of dower, her right to claim one-half of the real estate of her husband, granted by section 3716, Revised Codes, having attached before the deed became effective to divest deceased of title.

Real Estate—Options—Title—Doctrine of Relation.

4. In view of the statutory rule that until delivery of a deed placed in escrow, title remains in the grantor (Rev. Codes, sec. 4599), delivery of the deed referred to in paragraph 3, *supra*, may not be held, under the doctrine of relation, to relate back either to the date of the instrument or its delivery to the depository.

[As to doctrine of relation and when it is applicable, see note in 15 Am. Dec. 246.]

Appeal from District Court, Missoula County; John E. Patterson, Judge.

ACTION by Jane Tyler against George M. Tyler and another. From a decree for plaintiff, defendants appeal. **Affirmed.**

Cause submitted on briefs of counsel.

Mr. Theodore Lentz, for Appellants.

Where a deed is delivered as an escrow and afterward, and before the second delivery, the grantor becomes incapable of

making a deed, the deed shall be considered as taking effect from the first delivery, in order to accomplish the intent of the grantor, which would otherwise be defeated by intervening incapacity. (*Emmons v. Harding*, 162 Ind. 154, 1 Ann. Cas. 864, 70 N. E. 142; *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563; *Smiley v. Smiley*, 114 Ind. 258, 16 N. E. 585; *Goodpaster v. Leathers*, 123 Ind. 121, 23 N. E. 1090; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Wheelright v. Wheelright*, 2 Mass. 447, 3 Am. Dec. 66; *Bostwick v. McEvoy*, 62 Cal. 496; *Gammon v. Bunnell*, 22 Utah, 421, 64 Pac. 958 (1900); 4 Kent's Commentaries, 454.) The rule seems to be without exception that in the case of the death of the grantor after the first delivery and before the second delivery, the title passes at the first delivery, i. e., relates back to that time and is effectual from the first delivery.

Appellant's contention is also sustained under the principle of equitable conversion. Discussing that subject, it is said: "Where real estate is contracted to be sold, equity considers it as converted into personalty, even though the election to purchase rests merely with the purchaser." (9 Cyc. 828; *McKay v. Carrington*, 1 McLean, 50, 16 Fed. Cas. 167, Fed. Cas. No. 8841; *Kerr v. Day*, 14 Pa. 112, 53 Am. Dec. 526; *Lawes v. Bennett*, 1 Cox Ch. 167, 29 Eng. Reprint, 1111.)

Mr. V. S. Kutchin, for Respondent.

Our contention is that respondent comes squarely within the provision of section 3716, Revised Codes. In order to defeat this right appellant must establish that the giving of the option outlined above, with the execution of the warranty deed under date of October 28, 1909, and the placing of said deed as an escrow with the bank, to be delivered to Hugh Forbis and E. L. P. Ector, upon their complying with the terms of said option, worked such a change or divestiture of the title in Charles J. Tyler, that upon his death the title to said land was not vested in him; that he was not seised of said lands, and the title thereof did not pass to the respondent and his other heirs; but that said lands are to be considered as personal property and pass to the

personal representative. In order to sustain this position, the appellant must establish the fact that the giving of the option divested the grantors of said option of their title to the lands. The word "seised" means owned or possessed. (*Lucet v. Beekman*, 2 Caines (N. Y.), 385; *Tewksbury Tp. v. Readington Tp.*, 8 N. J. L. (3 Halst.) 319; *Dodge v. Stevens*, 105 N. Y. 585, 12 N. E. 759; *Warner v. Sprigg*, 62 Md. 14.) In other words, section 3716 means that a wife shall have dower in all lands belonging to her husband, as distinguished from equitable interest or title that she may hold in lands at the time of his death. The contract executed on October 28, 1909, upon its face, as well as by its terms, purports to be nothing but an option giving Forbis and Ector the right to purchase these lands, should they so desire. They were under no obligation to purchase the lands. Respondent had no right to compel them to purchase said lands against their will. (See *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; *Sweezy v. Jones*, 65 Iowa, 272, 21 N. W. 603; *Myers v. Stone & Son*, 128 Iowa, 10, 111 Am. St. Rep. 180, 5 Ann. Cas. 912, 102 N. W. 507.) It follows from the foregoing that the only thing conveyed or granted by the instrument was an irrevocable offer on the part of C. J. Tyler and Jane Tyler to sell their land to Forbis and Ector, should they desire to buy it and at any time up to and including April 1, 1910, complying with the terms and conditions of said instrument. The conclusion, therefore, is irresistible that at the time of Tyler's death he was seised of title to the lands belonging to him and described in said option, and that upon his death the title to said lands vested at once in his heirs. (*Conn v. Tonner*, 86 Iowa, 577, 53 N. W. 320.)

Appellants rest on the proposition that the deed, on delivery by the bank, on April 1, 1910, relates back and becomes effective as of date October 28, 1909, thereby altering the status of the estate and converting that which was realty at the time of Tyler's death, into personalty, and destroying respondent's right of dower in the real estate. It is not denied that the courts have announced and applied this doctrine of relation, but have

always, when so applying it, recognized it as a fiction of law, equitable in its nature and limited in its application to cases where it is necessary to prevent injustice or effect the plain intention of the parties. (*Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. 729.) In the instant case no necessity exists. Neither is there any injustice relating to any of the parties to the option and the general rule that a deed speaks from the actual date of delivery. On the contrary, very great injustice will result from the application of the doctrine of relation, for by this fiction the dower right of the widow will be destroyed. The widow's right of dower is a favorite of the law, but here it is urged that it shall be swept aside, not reluctantly, or from necessity, to prevent injustice, but gratuitously to take from the widow and add to the portion of the remoter kindred. (*Wheelright v. Wheelright*, 2 Mass. 247, 3 Am. Dec. 21.) This seems to be the earliest case in America which discusses the doctrine of relation, and the case cited in practically all subsequent decisions as laying down this doctrine. A careful reading of the case will show that what was said on the subject of relation was *dicta*. But granting what was there said on the subject of relation full force and effect, it will be perceived in the cases therein cited, as well as in the case itself, that the principle of necessity was present, if recourse had not been had to the doctrine of relation, there was no way in which the plain intention of the parties could have been effected.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by plaintiff to have allotted to her her dower in the estate of her deceased husband. The case was submitted to the court sitting without a jury, upon an agreed statement of facts which may be epitomized as follows: On October 28, 1909, Charles J. Tyler and the plaintiff, as husband and wife, entered into a contract with Hugh Forbis and E. L. P. Ector, under the terms of which the latter were, for the consideration of \$500, given the exclusive right to purchase certain lands belonging to the former, situate in Granite county, for

the sum of \$12,000. The lands were owned in part by the husband; title to the rest being vested in the plaintiff in her own right. The contract recites: "That the said parties of the first part, for and in consideration of the sum of \$500, * * * by these presents do give, grant, and sell unto the said parties of the second part, their successors, * * * the exclusive right, privilege, and option to purchase the following described lands. * * * " It was stipulated that the obligors should execute and deposit in escrow in the First National Bank of Missoula a warranty deed, with directions that it be delivered to the obligees, provided they should pay to the bank the sum of \$11,500 on or before April 1, 1910; another stipulation providing that the sum of \$500 paid upon the execution of the contract should be credited upon the purchase price. Time was made of the essence of the contract, and it was agreed that, in case the obligees failed to pay the purchase price on or before the date named, the obligors would be entitled to withdraw the deed from the bank and retain the cash payment. It was further agreed: "That if the said parties of the second part shall elect to purchase said property, and pay the said sum of \$11,500, and accept the said deed, then the said parties of the first part will immediately quit, deliver, and surrender the possession of said property." Tyler died intestate on January 8, 1910, leaving no children or descendants of children; the sole heirs being his widow, the plaintiff, and George M. Tyler, a brother, and Elta Simons, a niece, the defendants herein. In addition to the lands subject to the option contract, the decedent owned lands in Missoula county. The plaintiff was appointed and qualified as administratrix upon the estate. On April 1, 1910, Forbis and Ector deposited the purchase price in accordance with the terms of the contract and received the deed from the bank. A portion of the moneys so deposited the plaintiff used to pay the debts of the decedent and the expenses of administration. After allowing for these expenditures and deducting \$2,500, the amount the plaintiff was entitled to as the price of the lands held in her own right which were included in the sale, there

remains a balance of \$8,151.71. On September 23, 1912, the plaintiff made, in writing, her election to take, in lieu of dower, one-half of all the real estate of which her husband died seised, claiming that her right attached to the proceeds of the sale of the lands to Forbis and Ector, and thereupon brought this action to have her rights determined. The district court sustained her claim, and awarded her a decree accordingly. Defendants have appealed.

It is conceded that the decree was proper as far as it awarded her dower in the lands owned by her husband at the time of his death not included in the contract of sale. This concession is necessary, because a widow situated as is the plaintiff in this case is entitled, under section 3716 of the Revised Codes, to make her election to take one-half of the real estate remaining after the payment of all just debts and claims against her deceased husband, in lieu of dower awarded her under section 3708. Section 3716 provides: "If a husband die, leaving a widow, but no children, nor descendants of children, such widow may, if she elect, have, in lieu of her dower in the estate of which her husband died seised, whether the same shall have been assigned or not, absolutely and in her own right, as if she were sole, one-half of all the real estate which shall remain after the payment of all just debts and claims against the deceased husband: Provided, that, in case dower in such estate shall have been already assigned, she shall make such new election within two months after being notified of the payment of such claims and debts." This provision was considered by this court in *Dahlman v. Dahlman*, 28 Mont. 373, 72 Pac. 748. It was there held that the right granted is absolute, and is wholly independent of the right of the widow to participate in the distribution of the estate as heir of her husband. It attaches to all lands falling within the description in section 3708, unless it has been relinquished in legal form. One mode of relinquishment is by her joining with her husband in a conveyance other than a mortgage.

The question at issue therefore is: Did the delivery by the bank of the deed to Forbis and Ector operate to bar the plain-

tiff's right? The solution of this question will be reached when [1-3] it shall have been determined what was the legal effect of the delivery of the deed under the option contract, containing, as it did, the stipulation for the deposit of it with the bank. Aside from this stipulation, the only right granted by the option to Forbis and Ector was to buy the lands within a specified time. The transaction was neither a sale nor an agreement to sell. The contract did not grant a present interest in the lands, but amounted only to a standing offer to sell which Forbis and Ector could elect to accept, but were not bound to accept. The thing of value they acquired was the right to have the offer stand open until the expiration of the time fixed within which they could make their election. Tyler and wife were bound to hold the offer open for the time agreed upon, because they had been paid a consideration for so doing. Yet they could not compel Forbis and Ector to accept; nor could they recover damages for the failure to do so. The distinction between such a transaction and an agreement to sell was clearly pointed out in *Ida v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695. The one is the sale of an option—an executed contract—which does not become an agreement to sell until the election has been exercised. The other is an executory agreement which either party may require the other to perform according to its terms. As was further pointed out in that case, it may be that, by an agreement of the parties, the consideration paid for the option may become a credit upon the purchase price, if the purchaser of the option elects to purchase; but that this is so does not change the nature of the transaction. It still retains its distinctive character of an option contract, leaving the seller seised of the lands as fully as if the contract had not been made.

Nor do we think the situation of the title or the relations of the parties were altered by the fact that the obligors agreed to execute, and did execute and deposit the deed in escrow in the bank. "A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor." (Rev. Codes, sec. 4596.) "A grant may be deposited by the grantor

with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in the possession of the third person, and subject to condition, it is called an escrow." (Sec. 4599.) If the grant cannot take effect until delivery, the title remains in the grantor. (*Fuller v. Hollis*, 57 Ala. 435; *Keyes v. Meyers*, 147 Cal. 702, 82 Pac. 304.) If he die before the performance of the condition, the title necessarily descends to his heirs, subject to such right as the holder of the option contract has under which the deposit was made. (*Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. 729; *Flagg v. Teneick*, 29 N. J. L. 25; 16 Cyc. 578.) The title must vest somewhere; and, since the decedent did not divest himself of it by his contract, it vested in those who were entitled under the law to take by succession, viz., the heirs. In case of a devise by a testator of property subject to such a contract, the devisee takes under the will subject to be divested of his title by the performance of the condition by the obligee. (*Chadwick v. Tatem*, *supra*; Rev. Codes, secs. 4749, 4751.) Though, under the law of succession, the heirs take by the will of the legislature, instead of by the expressed will of the decedent, the rule is the same. (Rev. Codes, secs. 7603, 7614-7626.) If the deposit of the deed had not been made, and the decedent had been living when the purchase price was paid, the decedent and plaintiff would have been required to execute and deliver a deed. They could have been compelled to do so. (*Ide v. Leiser*, *supra*.) So, after he died, Forbis and Ector would have been entitled to have the plaintiff specifically perform the contract. It follows, therefore, that the deposit of the deed did not in any respect change the relations of the parties or give Forbis and Ector any greater right than if it had not been made. The subject of the contract remained the property of Tyler. He was seised of an estate of inheritance in it when the contract was executed, and he was so seised at the date of his death. At most, the execution and deposit of the deed was but a convenient device adopted by the parties to avoid the necessity of coming together again when the purchase price had been paid, to accom-

plish its execution and delivery. Under the statute *supra* (sec. 4599) the deed took effect upon its delivery, and served exactly the same purpose as if it had been both executed and delivered when the purchase price was paid. In the meantime, the husband having died seised of the lands within the meaning of the statute (sec. 3708), the dower right of the widow attached, and was not divested by the delivery of the deed. That this is so will be made apparent by illustration: A decedent may be possessed of a single piece of land. It may become necessary, during the course of administration, to sell the whole of it to procure funds to pay the claims of creditors of the decedent and the expenses of administration, it being of such a character that it cannot be divided. No one would contend that, under these circumstances, the proceeds would not be subject to the widow's right of dower. Again, the plaintiff signed the option. Under sections 7614 to 7626, *supra*, though the deed had not been deposited, she could have been compelled to make the conveyance. If it be said that this would have barred her right, the claim must be justified, if at all, by the assumption that the option contract was a conveyance. This we have shown it was not. We think that the term "conveyance," as used in the statute (sec. 3708), means a conveyance effective to transfer the title at the time it was made, and may not be construed to include one which has not become effective until after the rights of the widow have attached.

Counsel for the defendants invoke the doctrine of relation, and insist that, in order to prevent the defeat of the manifest [4] intention of the parties, the delivery of the deed must be held to relate to the date of its execution or its delivery to the bank. The rule on this subject is established in this jurisdiction by the statute *supra* (sec. 4599). The rule contended for by defendants is a fiction of law, applied by courts of equity in exceptional cases to sustain a conveyance which would otherwise fail of its purpose, and thus defeat the intention of the parties. *Wheelright v. Wheelright*, 2 Mass. 446, 3 Am. Dec. 66, *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563, *Smiley v. Smiley*,

114 Ind. 258, 16 N. E. 585, *Goodpaster v. Leathers*, 123 Ind. 121, 23 N. E. 1090, and *Bostwick v. McEvoy*, 62 Cal. 496, are illustrative cases. It has application to cases in which it is necessary to uphold a right. For example, it might be invoked to uphold the title in *Forbis and Ector*, but cannot be invoked to defeat the right of the plaintiff which attached before the second delivery. In *Chadwick v. Tatem*, *supra*, this court refused to apply it to a case which, in all essential particulars, is identical with this. It held that the provisions of the statute which were then in force and which have been brought forward into all the Codes since that time (Comp. Stats. 1887, Second Div., secs. 461, 463; Civ. Code 1895, secs. 1746, 1748; Rev. Codes, secs. 4749, 4751) were controlling, and that the rule had no application. As we have already pointed out, the fact that the property involved in that case had been disposed of by will, whereas in this case the decedent left no will, does not distinguish that case from this.

We are not now concerned about a solution of the question whether the bank could lawfully deliver the deed after the death of Tyler. It did so. The defendants tacitly agree that its action was lawful. This being so regarded, and the doctrine of relation held inapplicable, the plaintiff is clearly entitled to her dower in the proceeds of the sale, because her right attached before the deed became effective.

The judgment is affirmed.

'Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

KOHN ET AL., RESPONDENTS, v. CITY OF MISSOULA,
APPELLANT.

(No. 3,433.)

(Submitted November 12, 1914. Decided December 8, 1914.)

[144 Pac. 1087.]

*Cities and Towns—Special Street Improvements—Procedure—
Statutes—Void Assessment.*

1. To the lawful opening and widening of a street and the acquisition of property necessary therefor at the expense of abutting owners, compliance with the procedure requirements of sections 3369 and 3370, Article X of Part IV, Title III, Chapter III, Revised Codes, relating to special improvements, is necessary; an ordinance passed without regard to their provisions was therefore ineffective to authorize a special assessment to defray the cost of such an improvement.

[As to validity of street improvement made by city before dedication to or condemnation by the city, see note in Ann. Cas. 1914B, 208.]

*Appeal from District Court, Missoula County; A. L. Duncan,
Judge.*

ACTION by Carrie Kohn and others against the city of Missoula and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Cause submitted on briefs of counsel.

Mr. Frank Woody, for Appellant.

Messrs. Tolan & Gaines, for Respondents.

MR. JUSTICE SANNER delivered the opinion of the court.

On August 2, 1909, certain persons, owners of property abutting on East Front street, city of Missoula, presented to the city council their petition for the creation of a special improvement district to open and grade said street through to Van Buren street, the cost of the same to be assessed against the abutting property, payment to extend over a period of eight years. This petition was referred to and considered by appropriate

committees of the council, and on July 5, 1910, the council, "for the purpose of opening up and extending said East Front street through to Van Buren street as prayed for in said petition," adopted Ordinance No. 252. This ordinance, after declaring "that East Front street is hereby laid out, opened, widened and established from Madison street easterly to Van Buren street to the width of sixty feet," provides that certain property be acquired for such purpose, and that 75 per cent of the cost of acquiring such property be "assessed as a special tax against the property which will benefit by opening, widening and extending said street, * * * in proportion to the benefits received." Thereafter the city, acting under said Ordinance No. 252, acquired the property necessary for the purposes referred to, expending therefor about \$9,500, and also carried forward and completed the improvement. On July 30, 1913, the council, having determined what property was benefited thereby and the amount of benefit received by each piece or parcel of land, proposed for adoption a certain resolution designated as Resolution 245A, levying a special assessment in various sums (to the aggregate amount of 75 per cent of the cost above mentioned) upon the several pieces or parcels of land determined to have been so benefited, and caused to be duly published a notice to the effect that on August 6, 1913, the city council would hear all persons concerned or interested, in protest or objection to the final adoption of said resolution. On August 5 the respondents filed their written protest based in part upon the admitted facts that no resolution was ever adopted declaring the intention of the council to make the improvement or to make it at the expense of property owners, or fixing a time at which they might be heard in objection thereto, or designating the boundaries of the district to be affected, nor was any notice of intention of the council to so act, describing the improvements proposed to be made, stating the estimated cost thereof, and designating a time for hearing objections thereto, ever given to the owners of property to be affected thereby, either by publication, posting or service. The protest was overruled, and Resolution 245A was

finally passed. The respondents are owners of property affected by the proposed levy and assessment fixed in said Resolution 245A, and the appellants, assuming to act under said resolution, threaten to, and unless restrained will, proceed to enforce the collection of said special assessments by legal proceedings and sale.

Upon this state of facts as presented by the pleadings, the cause was submitted to the court for decision and determination. The findings of fact and conclusions of law are recited in the judgment, the effect of which is to declare Resolution 245A to be void and to perpetually enjoin the appellants from enforcing or attempting to enforce the same. This appeal is from that judgment.

The validity of Resolution 245A, with the assessment sought to be made thereunder, depends upon the force and effect of [1] Ordinance No. 252, in so far as it attempts to authorize the imposition of any part of the cost of the improvement in question upon the owners of private property. It is urged by the respondents that Ordinance No. 252 was wholly ineffective for that purpose, because, although sections 3367 to 3429 (Art. X) Revised Codes, were then in force, the procedural requirements of sections 3369 and 3370 were confessedly ignored by the council. The ultimate question is whether these sections apply to public improvements of the character here involved.

The appellants' contention is that these sections do not authorize, and have no application to, improvements such as are here involved, for the following reasons: That the things directed by Ordinance No. 252 to be done were "the opening, extending and widening" of a street and the acquisition of property necessary therefor; that the power to do these things is expressly conferred by subdivisions 6 and 75 of section 3259, Revised Codes, and not by section 3369 or any provision of Article X, and therefore the council was not obliged to observe the requirements of that or the succeeding section in its proceedings; that since the power referred to is not granted by any section of Article X, sections 3379 and 3380, which provide how the cost of

acquiring property for opening and widening a street may be imposed upon private owners, must refer to the power granted by subdivisions 6 and 75 of section 3259, and must be taken as prescribing all the prerequisites to jurisdiction in such cases. This reasoning is ample to sustain the validity of Ordinance No. 252 in so far as it establishes the street in question and authorizes the acquisition of private property necessary to open the street to public travel; but as an effort to justify a public improvement at private expense, without regard to the provisions of sections 3369 and 3370, it is unavailing for several reasons.

In the first place, Ordinance No. 252 does not in terms create a special improvement district. This alone is sufficient to defeat those provisions of it which seek to authorize the special assessments, unless we hold that such assessments may be imposed in other ways than by means of special improvement districts, or the ordinance be considered as an attempt to create such a district. The position of appellants is that part of the cost of securing property for the purpose of opening or widening a street can be imposed upon private owners without regard to the provisions of Article X governing the creation of special improvement districts and cannot be imposed under them. This position is based upon the assumed inadequacy of section 3369 and the necessity for a sufficient antecedent for sections 3379 and 3380.

We do not think that section 3369 is inadequate to include the work of opening and widening a street. In fact, almost any public improvement imaginable might be said to be comprehended within the general terms employed. (*Stadler v. City of Helena*, 46 Mont. 128, 127 Pac. 454.) The language upon this particular point is as follows: "The city or town council is authorized to provide by ordinance a system for doing any or all work, in or upon the streets, highways or public places of the city or town, and for making thereon street improvements and repairs and for doing any or all work authorized by this Act, and for the payment of the cost and expenses thereof. In

all cases where any part of the expense of any such improvement * * * is to be defrayed by special assessment, the council must," etc. Assuming the existence of a street to be opened or widened, it is difficult to see why such opening or widening is not "work upon streets," or is not an "improvement thereon," or is not "work authorized by this Act," in view of the express language of section 3379. Clearly, too, the phrase "such improvement" refers to anything that may constitute an improvement upon streets which is authorized to be done by section 3369 or by any of the provisions of Article X. As we understand the appellants' position, it is that by Article X "the legislature only intended to grant the city and town councils the power * * * to cause to be made improvements which could be made on a street, avenue or alley already laid out and in use by the public." Literally interpreted, this argument defeats itself; for, if a street "laid out and in use by the public" may not be opened, it may at least be widened or extended. We take the appellants to mean, however, that the acquiring of private property for the purpose of opening or widening a street is not in itself an improvement within the contemplation of Article X, and that, where the acquiring of private property is necessary for such purpose, such acquisition is a prerequisite to the existence of the street, and there is no street upon which work may be done or an improvement be made, until such property is acquired. Appellants are really not in position to urge this because of their admission of respondents' repeated averments that the operations authorized by Ordinance No. 252 were improvements upon a certain street of the city of Missoula. So, too, the existence of East Front street in some condition prior to the passage of the ordinance seems to be assumed by the petition for the improvement, as well as by the ordinance itself. However that may be, the passage of the ordinance was effective to bring the street into being if it had no existence before. A street exists for the purpose of being worked or improved, when it is laid out or established, and it is laid out and established whenever the proper authorities have properly defined and pro-

claimed it. To make the street available to the public may involve the acquisition of private property, as it may involve the expenditure of physical effort; but neither is essential to the concept of a street, for which property may be acquired or upon which work may be done. If, therefore, the work necessary to open or widen a street is within the provisions of section 3369, as we hold it is, the acquisition of property, where necessary, is a prerequisite, not to the existence of the street, but to the successful accomplishment of such work. This must follow, not only from the general relation of sections 3379 and 3380 to the other sections of Article X, but also from the language employed. Attention was called in *Stadler v. City of Helena*, 46 Mont. 128, 127 Pac. 454, to the fact that the portion of Article X comprised within sections 3367 to 3417, Revised Codes, is a mere reproduction of the Act approved March 8, 1897 (Fifth Session Laws, pp. 212-223), as the same was amended and in force at the time the Revised Codes were adopted. These sections (3367 to 3417) are therefore to be considered as a single legislative Act, the evident purpose of which was to provide a detailed plan for public improvements the cost of which might be borne or shared by property owners. Sections 3379 and 3380 must therefore be regarded as having some reference to the plan so devised and to the methods of inauguration set forth in the sections now numbered as 3369 and 3370. Unless this be so, or if it be true that the power to open or widen a street for which private property must be obtained is not within any section of Article X, but must be sought in section 3259, then the power to make such an improvement at private expense is nowhere granted, for only by virtue of the special improvement district provisions of Article X could such power be exercised. (*Ford v. Great Falls*, 46 Mont. 292, 127 Pac. 1004.) Sections 3379 and 3380 would thus be left "in the air," because they cannot be brought into play save upon the assumption that such an improvement is within the purview of Article X.

This result, as well as the special purpose of sections 3379 and 3380, is further illuminated by the language employed in

section 3379: "Whenever it is desired to make a special assessment to defray the cost of obtaining private property for the opening or widening of any street or alley, or for other purposes, or for any of the improvements mentioned in the preceding section, the city or town council shall," *etc.* The word "section" here is a misprint for sections, and obviously refers to all the preceding sections of the same Act and to nothing else. Sections 3379 and 3380 thus presuppose that the method prescribed in sections 3369 and 3370 has been followed so far as the inauguration of the system is concerned, but they provide a special basis and a special procedure by which the cost of securing property for the purposes mentioned may be distributed. In the case of improvements the cost of which is assessed to private owners according to frontage or area, there is no need for any further hearing after the resolution of intention has been heard and finally adopted; but, when the improvement consists in the extension or widening of a street, not all the cost of acquiring the necessary property can be taxed to the benefited owner (section 3380), and the benefit received by such owners remains undetermined by the resolution of intention. As to this there may and generally will be difference of opinion; and, to give each owner an opportunity to show that the distribution tentatively offered by the council is disproportionate, the further resolution and hearing are required by section 3379.

Finally, the interpretation which appellants give to sections 3369, 3370, 3379 and 3380, would empower the council to make a certain class of public improvements at private expense, without regard to the attitude of those upon whom the burden is made to fall; all they can do is to object to the apportionment of such expense as among themselves, after it has been incurred. Nothing short of unequivocal language can warrant the conclusion that such was the legislative intent. Such an intent is expressed by section 3373, with respect to district sewers, but nowhere else, and the reasonable inference is that no such course should be permissible in any other case.

This court has held (*Ford v. Great Falls, supra; Shapard v. City of Missoula*, 49 Mont. 269, 141 Pac. 544) that the portion of section 3369 above quoted is permissive, but that the balance of that section and all of section 3370, prescribing the mode in which the authority granted shall be exercised, are mandatory and jurisdictional. This being so, and the improvement in question being of the character contemplated by section 3369, the conclusion must be that Ordinance No. 252, passed without any regard to such provisions, was ineffective to authorize any special assessment to private owners.

The judgment of the district court was therefore correct, and must be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

KERSTEN, RESPONDENT, v. COLEMAN, APPELLANT.

(No. 3,434.)

(Submitted November 12, 1914. Decided December 8, 1914.)

[144 Pac. 1092.]

*Default Judgments—Setting Aside—Discretion—Real Estate—
Warranty Deeds—Mortgages—Cancellation—Parties.*

Default Judgment—Setting Aside—Discretion.

1. The matter of relieving a party of a default judgment is one addressed to the sound, legal discretion of the trial court, even though movant has made an affirmative showing of mistake, inadvertence or excusable neglect.

[As to vacation and setting aside of default judgments, see note in 58 Am. Dec. 392.]

Same—Refusal to Set Aside—When Justified.

2. Where defendant permitted twelve days to elapse between the day he became aware of the entry of default against him and the day he moved to have it set aside, after formal proof had been made and judgment entered, giving no excuse for his failure to appear, other than that he believed in good faith that twenty days after June 6 (the day summons was served) would include June 30, refusal to set it aside was justified.

Real Estate—Warranty Deeds—Mortgages—Cancellation—Party Plaintiff.

3. Where real estate is sold under a deed warranting title against encumbrances, the grantor may, after he has parted with title, maintain suit to have a mortgage, placed on record after he became the owner and of the existence of which he was unaware, canceled of record.

Cancellation of Instruments—Decree.

4. Where plaintiff was justly entitled to a decree canceling a mortgage of record, the action of the court in designating the county clerk to cancel the instrument, instead of appointing a commissioner to do so, gave defendant no cause for complaint.

Appeal from District Court, Missoula County; John E. Patterson, Judge.

ACTION by Rudolph F. Kersten against Charles E. Coleman. Judgment by default for plaintiff, and defendant appeals from it and an order refusing to set it aside. Affirmed.

Cause submitted on briefs of counsel.

Messrs. Woody & Woody, for Appellant.

The plaintiff is not the real party in interest, as he shows by the allegations of his complaint that he is not the owner or in the possession of the land mentioned and described in his complaint, or of any part thereof, and not being the real party in interest, therefore he should not maintain this action. "In suits to quiet title, the action must be brought by the party in interest, and both possession and title must be shown." (*Wolverton v. Nichols*, 5 Mont. 89, 2 Pac. 308; affirmed in *Milligan v. Savery*, 6 Mont. 129, 9 Pac. 894.) "The action cannot be maintained as a suit to quiet title, since the necessary averment of ownership on part of the plaintiff does not appear, and the case cannot be tried on that theory." (*Boucher v. Barsalou*, 25 Mont. 439, 65 Pac. 718.) In *Chapman v. Jones*, 149 Ind. 434, 47 N. E. 1065, the court said: "The statute requiring every action to be prosecuted in the name of the real party in interest, a grantor by warranty deed, cannot maintain suit in his own name, to quiet title against the persons claiming an interest in the land paramount to that conveyed to the grantee. * * *

A person who sold premises and delivered possession to his grantee cannot maintain a suit to remove a cloud therefrom,

even when he conveyed by warranty." (See, also, *Glos v. Goodrich*, 175 Ill. 20, 51 N. E. 643.) "One in possession of real estate, but having no legal or equitable title thereto, cannot maintain an action to remove a cloud upon the title." (*Jackson v. La Moure County*, 1 N. D. 238, 46 N. W. 449; *Wilkinson v. Hiller*, 71 Miss. 678; see, also, 17 Ency. Pl. & Pr. 300; *Schlosser v. Cruickshank*, 96 Iowa, 414, 65 N. W. 344; *Loomis v. Roberts*, 57 Mich. 284, 23 N. W. 816; *Toland v. Toland*, 123 Cal. 140, 55 Pac. 681; *Glos v. Randolph*, 138 Ill. 268, 27 N. E. 941; *Whipple v. Gibson*, 158 Ill. 339, 41 N. E. 1017; *Dick v. Foraker*, 155 U. S. 404, 39 L. Ed. 201, 15 Sup. Ct. Rep. 124.)

Mr. William Wayne, for Respondent.

Defendant's attack upon the complaint is based upon the erroneous theory that the cause of action attempted to be stated is one to quiet title. Based upon this fundamental error he proceeds to the conclusion that no cause of action is stated because the complaint shows a conveyance by respondent prior to the institution of the action; that he, therefore, is without title or interest in the property and has nothing to be quieted. This is an entirely erroneous conception of the nature of the action. The suit is not one to quiet title, but is one for the cancellation of an instrument and based upon section 6115 of the Revised Codes. In the case of *Lewis v. Tobias*, 10 Cal. 574, Judge Baldwin, speaking for the court, classifies the cases over which the equitable jurisdiction to cancel instruments is exercised, and expressly recognizes the existence of a cloud upon title as one of the grounds calling for such exercise, as follows: "2. When the instrument is a deed or other document concerning real estate, which, although inoperative if suffered to remain uncanceled, would throw a cloud upon the plaintiff's title to the lands, which it embraces or to which it refers." The distinction between the two kinds of suits is easily drawn and is recognized in this state. (See *Hicks v. Rupp*, 49 Mont. 40, 140 Pac. 97; *Wiard v. Brown*, 59 Cal. 195; *Angus v. Craven*, 132 Cal. 691, 64 Pac. 1091.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In September, 1911, R. F. Kersten became the owner of certain real estate in Missoula county. In June preceding, his predecessor had executed and delivered to C. E. Coleman a mortgage upon the same property, but the mortgage was not placed on record until April, 1912. Kersten sold the property to the W. H. Smead Company, and executed and delivered a deed containing a covenant of warranty against encumbrances (except a mortgage placed thereon by himself). After the transfer to the Smead Company, Kersten commenced this suit to have the Coleman mortgage canceled and satisfied of record. Service of summons was completed on June 6. On June 27 the default of defendant was entered for his failure to appear. On July 11 proof was made and a decree rendered and entered in favor of plaintiff agreeable to the prayer of the complaint. On July 12 counsel for defendant moved to set aside the decree, vacate the default, and permit a proposed answer, which was tendered, to be filed. The motion was denied, and defendant appealed from the judgment and from the order.

When one who is in default applies to the court for relief, it [1] is incumbent upon him to show affirmatively that the default resulted from mistake, inadvertence, surprise or excusable neglect, and even when such showing is made, relief may be granted as a matter of grace, but cannot be demanded as a matter of right; in other words, the statute refers the subject to the sound, legal discretion of the trial court. (Rev. Codes, sec. 6589.) The statute has made the very liberal allowance of twenty days after service of summons, within which a defendant may make his appearance in the district court, and the circumstances of any given case must be most extraordinary to excuse a failure to appear within that time. Generally speaking, it is the policy of the law that every cause shall be determined upon its merits, but this policy does not give countenance to inexcusable negligence, the result of which is to prolong litigation unnecessarily.

In the affidavit supporting the motion to set aside the default, [2] counsel sets forth that service of summons was made on June 6, but that he "believed in good faith that Monday, June 30, was the last day on which the defendant could appear and file a demurrer or answer," and that on June 30 he was informed that default had already been entered. We are left altogether in the dark, as was the district court, as to the process by which counsel reached the conclusion that twenty days from June 6 included June 30, and no suggestion is offered that the oversight, if such it was, was occasioned by sickness, absence from home, or even a press of other business. Indeed, there is not any excuse offered at all. On the contrary, counsel makes it appear affirmatively that, although he knew of the default on June 30, he did not move to have it set aside until July 12, after formal proof had been made and the decree had been entered. It is elementary in this state that one in default must move to set it aside at the earliest moment practicable. (*Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739; *Swilling v. Cottonwood Land Co.*, 44 Mont. 339, 119 Pac. 1102.) Defendant's failure to excuse his default, in the first instance, and his delay in applying for relief after notice, fully justified the trial court's ruling. (*Scilley v. Babcock*, 39 Mont. 536, 104 Pac. 677; *Pearce v. Butte Electric Ry. Co.*, 40 Mont. 321, 106 Pac. 563.)

The appeal from the judgment presents the question: May [3] Kersten, after he has parted with title to the property, maintain this suit? The land encumbered by the Coleman mortgage is not involved. The subject matter of this litigation is the cancellation of the mortgage, and, though plaintiff has parted with the title to the real estate, his interest in having the record cleared of this encumbrance is sufficient to enable him to prosecute this suit. (30 Cyc. 30.) Section 6115, Revised Codes, provides: "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled." Kersten's warranty deed bound him

to hold the Smead company harmless from the operation of this mortgage. He could not compel his grantee to bring this suit, and so long as the mortgage was extant, his liability continued. The Smead company could properly call upon him to clear the title to the land, and unless he can now maintain this suit, his only other recourse is to pay the mortgage which, as to him, is voidable if not void. He alleges in his complaint that at the time he purchased the property he had no notice or knowledge of this outstanding unrecorded mortgage, and if this is true, then such mortgage was and is, as to him, absolutely void. (Rev. Codes, sec. 4684.) In our opinion, section 6115 above was intended to cover such cases as this, as well as analogous ones. The following authorities, though not directly in point, shed light upon the principle involved: 6 Cyc. 319, tit. "Parties"; *Gifford v. Workman*, 15 Iowa, 34; 1 Story's Equity Jurisprudence, 10th ed., sec. 691.

The decree is not open to objection because the county clerk [4] is directed to cancel the mortgage of record. The trial court might properly have appointed a commissioner to perform the service, but, if the clerk proceeds, this defendant is not in position to complain that someone else ought to have been selected.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

IN RE SUTTON.

(No. 3,502.)

(Submitted June 22, 1914. Decided December 11, 1914.)

[145 Pac. 6.]

***Attorneys—Disbarment—Procedure—Conviction of Felony—
Forgery—Convicts—Pardon—Effect.*****Attorneys—Conviction of Felony—Disbarment—Procedure.**

1. Upon lodgment with the clerk of the supreme court of a certified copy of the record of an attorney's conviction for a felony, that court, under section 6410, Revised Codes, if it appear of record that the judgment of conviction is final either by reason of his acquiescence in it or made so by affirmance on appeal, must, without notice or citation, enter judgment that his name be stricken from the roll of attorneys.

[As to crimes and other misconduct which are causes for disbarment, see notes in 42 Am. Rep. 557; 45 Am. St. Rep. 71.]

Same—Forgery—Moral Turpitude.

2. The crime of forgery involves moral turpitude, within the meaning of subdivision 1, section 6393, Revised Codes, providing for the disbarment of attorneys on conviction "of a felony or misdemeanor involving moral turpitude."

Convicts—Pardon—Effect.

3. By applying for and obtaining a pardon, an attorney convicted of crime will be held to have acquiesced in the judgment of conviction.

Same—Unconditional and Conditional Pardon—Effect.

4. While an unconditional pardon may be said to have the effect of canceling the judgment of conviction for crime, thus relieving the offender of the consequences of his act, a conditional one has no such effect.

Same—Conditional Pardon—Violation of Condition—Effect.

5. One convicted of crime who transgresses any of the restraints placed upon him by a conditional pardon occupies the position of an escaped convict.

Same—Pardon—Acceptance—Effect.

6. A conditional pardon is in the nature of a deed, and must be accepted; after acceptance, all conditions which may lawfully be imposed upon the convict are binding upon him.

E. L. SUTTON, a member of the bar of Montana, was convicted of the crime of forgery, and ordered disbarred under the provisions of subdivision 1 of section 6393 and section 6410, Revised Codes.

Mr. E. L. Sutton, appearing *pro se*, filed a brief and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On April 11, 1914, E. L. Sutton was tried in the district court of Chouteau county upon a charge of forgery, and by a verdict of the jury found guilty. He was thereafter by judgment of the court sentenced to a term of two years in the state prison. At the time the charge was preferred against him, and at the time of his conviction, Mr. Sutton was an attorney and counselor at law and a member of the bar of Montana. Thereafter, on May 14, the clerk of the district court, under the command of the statute (Rev. Codes, sec. 6409), lodged with the clerk of this court a certified copy of the record of conviction. When this fact was brought to its attention, this court made an order directing a citation to issue to Sutton requiring him to show cause why he should not be removed from his office. The citation was served on June 1. On June 6 Mr. Sutton filed an answer, admitting his conviction, and alleging that there was then pending in the district court an application for a new trial; that it was being prosecuted by him in good faith; and that, in the event it should be denied, he intended to prosecute an appeal to this court. He also alleged that the crime of which he was convicted does not involve moral turpitude, and therefore his conviction of it does not justify his suspension or disbarment. The court thereupon deferred disposition of the matter until the criminal prosecution could be disposed of. On September 14 Mr. Sutton filed an amended answer, in which he alleged that on August 10 the Honorable Samuel V. Stewart, the governor, transmitted to the board of pardons a pardon of the offense of which he had been convicted; that on August 28, after consideration, the board approved the governor's action; that on August 31 the governor made an executive order pardoning Mr. Sutton; and that on September 3 Mr. Sutton accepted the pardon, which is now in full force and effect. The order of the governor, after reciting that he had granted a conditional pardon to Mr. Sutton and that his action had been approved by the board, recites:

"Now, therefore, I, S. V. Stewart, Governor of the state of Montana, in view of the approval of my action by the state board of pardons do hereby declare and order the release of the said E. L. Sutton from the state prison of the state of Montana, on the following conditions:

"First. That the said E. L. Sutton shall make a written report to the secretary of the state board of pardons, at least every thirty days, stating his postoffice address, the nature of the work in which he is engaged, the name of his employer if he be employed steadily by one employer, and such other information as may at any time be required of him by the board or any member thereof.

"Second. That he shall not at any time be guilty of a breach of any of the laws of the state of Montana or of any of the conditions of this pardon. And further that he shall abstain from the use of intoxicating liquors in any manner or form whatsoever during the term and life of this conditional pardon, and that he shall refrain from frequenting saloons or other places where intoxicating liquors are kept or sold.

"Third. That he shall immediately proceed to look after, provide for and care of his wife and children.

"Fourth. That he shall, during the remainder of his term of service, be at all times in the legal custody and control of the state board of prison commissioners, and subject at any time to be returned to the state prison for a breach of any of the conditions of this conditional pardon or for other good and sufficient cause to the state board of pardons appearing. And a written order of the state board of pardons, certified by the state prison warden in charge of the state prison, shall be a sufficient warrant to any officer to retake and return said prisoner to actual custody.

"This conditional pardon having been approved by the state board of pardons, it shall immediately effect the release of the said E. L. Sutton under the conditions named, but before leaving the custody of said prison, the said Sutton shall signify in writ-

ing his acceptance of the conditional pardon and of all the conditions imposed thereby and therein."

Since, under section 6393 of the Revised Codes, the certified [1] copy of the record of conviction is made conclusive evidence, and this court is left no discretion but to proceed under section 6410, the convicted attorney and counselor is not entitled to notice by citation or other process. It is his bounden duty to know that the legal consequence of his final conviction is his disbarment. (*In re Bloor*, 21 Mont. 49, 52 Pac. 779.) Of course the conviction must be final by reason of acquiescence by the convict in the judgment of the trial court, or by affirmance by this court. It would manifestly be an injustice to him for this court to disbar or suspend him from office, until the finality of the judgment has been made apparent; otherwise, though by the subsequent proceedings in the criminal prosecution he might be found not guilty and be awarded full and complete vindication and his innocence of any wrong be fully established, in the end the order of disbarment or suspension would stand of record. In the *Bloor Case* the judgment of conviction had become final by affirmance by this court. (*State v. Bloor*, 20 Mont. 574, 52 Pac. 611.) In this case, the record not disclosing what was the condition in the case of *State v. Sutton*, we deemed it proper to issue the citation in order to permit it to be disclosed.

We shall not stop to investigate the question whether the crime [2] of forgery involves moral turpitude. That it does is so clearly apparent that argument to the contrary is not permissible.

By applying to the governor for a pardon and obtaining it, [3] Mr. Sutton acquiesced in the judgment of conviction. For the purpose of this proceeding, therefore, that judgment became final. In his brief Mr. Sutton assumes the position that the effect of the pardon is not only to release him from the [4] punishment inflicted by the judgment of conviction, but that it obliterates, in legal contemplation, the offense itself and restores him to the same standing in the community as if the

offense had never been committed. In support of this argument he cites: *Edwards v. Commonwealth*, 78 Va. 39, 49 Am. Rep. 377; *State v. Page*, 60 Kan. 664, 57 Pac. 514; *Carlisle v. United States*, 16 Wall. 147, 21 L. Ed. 426; *Osborn v. United States*, 91 U. S. 474, 23 L. Ed. 388. He also cites and relies with confidence upon the case of *Scott v. State*, 6 Tex. Civ. App. 343, 25 S. W. 337, to the point that though the statute makes it the duty of the court to strike from the rolls the name of an attorney upon proof of his conviction of a felony, if it is made to appear that the offender has been pardoned, the record of the judgment of conviction has wholly lost its probative value because it has been wiped out by the pardon. Hence he argues, the judgment having been canceled by his pardon by the governor, all its force as a conviction for a felony has been taken away, and it no longer furnishes the basis for a disbarment proceeding. We have no fault to find with anything said in any of these cases. It will be noted, however, that all of them, except *Osborn v. United States*, discuss the force and effect of an unconditional pardon. In this case the court had under consideration the effect of a pardon of Osborn by the President, of the offense of participating in the rebellion on account of which his property had been condemned and ordered to be sold under the confiscation laws of 1862. (Act July 17, 1862, Chap. 195, sec. 7, 12 Stat. 591.) Two conditions were attached to the pardon: First, that Osborn should pay all the costs of the proceeding pending against his person or property before his acceptance of the pardon; and, second, that he should not, by virtue thereof, claim any property, or the proceeds of any property, which had been sold by decree of a court under the confiscation laws of the United States. There was no question that the first condition had been fulfilled. The question was whether an attempt by Osborn to assert a claim to the proceeds of his property, as against the officers of the court who had misappropriated them, was a violation of the second condition. The court, speaking through Mr. Justice Field, held that it was not. In the opinion it was said: "The pardon of that offense necessarily carried with it the

release of the penalty attached to its commission, so far as such was in the power of the government, unless specially restrained by exceptions embraced in the instrument itself. It is of the very essence of a pardon that it relieves the offender from the consequences of his offense." This passage discloses that the court was of the opinion that, inasmuch as the first condition imposed by the pardon, which was precedent, had been performed, the pardon had become unconditionally operative for all purposes, except so far as restrained by the second condition, which was in legal effect a limitation as to its operative effect, and not a condition for the violation of which the pardon would become nugatory.

Scott v. State was a disbarment proceeding. Inasmuch as it appeared that the offender had been granted an unconditional pardon prior to the institution of the proceeding, the court held that the record of conviction, having been wiped out by the pardon, could not be looked to as evidence of a conviction of a felony necessary to support a judgment of disbarment under the statute. A conditional pardon, such as was granted by the governor in this case, cannot, in the nature of things, have such effect.

Besides the other conditions which Mr. Sutton must observe, he is required during the remainder of his term of service to remain in the custody and control of the state board of prison commissioners and be subject to be returned to the prison for a breach of any of the conditions, or for any other cause appearing to the state board of pardons to be good and sufficient.

Under the Constitution (Art. VII, sec. 9) and the statute (Rev. Codes, sec. 9556), the governor is authorized to impose conditions without restriction, so long as they are not illegal, immoral or impossible of performance. (*Fuller v. State*, 122 Ala. 32, 82 Am. St. Rep. 1, 45 L. R. A. 502, 26 South. 146; *Ex parte Marks*, 64 Cal. 29, 49 Am. Rep. 684, 28 Pac. 109; *In the Matter of Convicts*, 73 Vt. 414, 51 Atl. 10; *State v. Peters*, 43 Ohio St. 629, 4 N. E. 81; *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395.)

The act of the governor, as expressed in the order *supra*, though designated by him as a pardon, is closely assimilated to a parole, which he also has the authority to grant under certain restrictions. (Rev. Codes, secs. 9573-9575.) A parole does not operate to wipe out the judgment of conviction but merely suspends its operation by remitting, for the time being, the confinement and hard labor, until the end of the term, or until an unconditional pardon is granted. Until one of these events occurs, the offender is subject, upon a violation of any of the conditions, to be taken into custody and be held to suffer actual imprisonment as though the parole had not been granted. The same rule applies here. The imposition of the conditions implies the existence of a judgment; that it is just and regular; [5] that its execution has been by the act of the governor merely deferred to a future time, to be determined by Mr. Sutton's failure to perform the obligations he has assumed by his acceptance of it. Whenever he transgresses any of the restraints imposed upon him, he will occupy the position of an escaped convict and be subject to be dealt with accordingly. (*Fuller v. State, supra.*) This was the rule at common law (Bacon's Abr., Title "Pardon," E), and it has been recognized and adopted generally in this country. (*In the Matter of Convicts, supra; Arthur v. Craig, supra; Fuller v. State, supra; State v. Wolfer*, 53 Minn. 135, 39 Am. Rep. 582, 19 L. R. A. 783, 54 N. W. 1065; *Kennedy's Case*, 135 Mass. 48.) The pardon [6] being in the nature of a deed, it must be accepted. (*United States v. Wilson*, 7 Pet. 150, 8 L. Ed. 640.) Having been accepted, all the conditions of it not open to any of the objections above noted become binding. (*In re Ross*, 140 U. S. 453, 35 L. Ed. 581, 11 Sup. Ct. Rep. 897.)

For the purpose of this proceeding, therefore, the judgment in *State v. Sutton* is a valid, subsisting judgment, notwithstanding the order of the governor. It is true that, upon expiration of Sutton's term of service, the pardon will become absolute. At least this seems to have been the purpose of the governor. But this does not relieve this court from the duty imposed upon it

by the statute. It is left without discretion, and hence must make the order of disbarment. To give the pardon the effect which Mr. Sutton insists should be accorded to it might lead to consequences which would prove embarrassing. If Mr. Sutton should transgress any of the restraints imposed upon him, or his conduct, though not directly violative of any of them, should, in the opinion of the board of pardons, be such as to justify his return to prison, the pardon would be annulled. The result would be that Mr. Sutton would be a member of the bar in good standing, notwithstanding his status as such would, in the eye of the law, have ceased to exist.

Let judgment be entered in accordance with section 6420 of the Revised Codes.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

NIXON, APPELLANT, v. MONTANA, WYOMING & SOUTH-
WESTERN RY. CO. ET AL., RESPONDENTS.

(No. 3,418.)

(Submitted October 27, 1914. Decided December 11, 1914.)

[145 Pac. 8.]

*Railroads—Personal Injuries—Death—Children—Turntable
Doctrine—Boarding Moving Trains—Invitation—Fencing
Tracks—Statutes—Complaint—Insufficiency.*

Railroads—Children—Boarding Moving Trains—Fencing Tracks—Statutes—Complaint—Insufficiency.

1. Complaint in an action for damages for the death of a child alleged to have been the result of the negligent failure of the defendant company to maintain a fence along its track, as it was its duty to do under section 4308, Revised Codes, *held* insufficient to state a cause of action under such statute, the enactment of which was for the benefit of owners of livestock, and not to make railway companies liable for injuries to children.

[As to violation of fencing statute or ordinance not intended for plaintiff's benefit as actionable negligence, see note in Ann. Cas. 1912D, 1107.]

Same—Turntable Doctrine—Complaint—Insufficiency.

2. Complaint further *held* insufficient to state a cause of action under the turntable doctrine, where the only allegation touching the unusually alluring character of the thing by reason of which the child was impliedly invited upon defendant company's track, was that a slowly moving train, in which two cars had been placed behind the caboose, thus made up and so moving, was attractive to children, *etc.*

Same—Injuries on Tracks—Implied Invitation—Custom.

3. A railway company which permits the use of its tracks as a highway by school children must expect their presence and operate its trains accordingly; its implied invitation in this regard, however, does not carry with it a license to use them to board its freight trains or for any other purpose.

Same—Boarding Moving Trains—Implied Invitation.

4. *Quære*: May an invitation by a railway company to children to board moving freight trains be implied from toleration of previous attempts so to do?

Appeal from District Court, Carbon County; Geo. W. Pierson, Judge.

ACTION by O. R. Nixon against the Montana, Wyoming & Southern Railway Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Messrs. Mackel & Tyvand, for Appellant, submitted a brief; *Mr. Henry A. Tyvand* argued the cause orally.

By section 4308, Revised Codes, a duty is placed upon the railroad corporation. It requires the citation of no authority to the effect that where there is a duty imposed and injury results as a violation of that duty, we have a ground of negligence which entitles the injured party to damages. This is fundamental. The defendants, however, contend that because certain provisions are made which apply only to cattle, *etc.*, therefore, the larger duty imposed must be held to be limited to the lesser obligation. Without discussing the phraseology of this section, we will content ourselves by saying that years ago courts were prone to take such a view of this kind of legislation, but of late years they have taken the position that this is a police regulation which inures to the benefit of all members of the community. (*Rosse v. St. Paul & S. D. Ry. Co.*, 68 Minn. 216, 64 Am. St. Rep. 472, 37 L. R. A. 591, 71 N. W. 20.) Not only have state courts construed such a law as a police regulation, which

is for the benefit of all persons of the community (as well as cattle), but the supreme court of the United States has held that such a law inures to the benefit of a child of tender years who is injured because the law had not been complied with. (*Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 38 L. Ed. 434, 14 Sup. Ct. Rep. 619.) The wording of the law there in question much more clearly indicates that it was intended only as a protection for cattle than does the Montana law. Yet, as seen above, the court held that the benefit of this law inured to a child of tender years. Furthermore, we invite especial attention to the recent case where a child was injured because a shaft had not been fenced as required by our law. (*Conway v. Monidah Trust Co.*, 47 Mont. 269, 132 Pac. 26.) These two cases practically dispose of the contention made by the defendants. Some point is made that because the train crew did not see the child, *etc.*, this might make a difference, but in an almost similar case, the supreme court of the United States held adversely to this contention. (*Hayes v. Michigan Cent. Ry. Co.*, 111 U. S. 229, 28 L. Ed. 411, 4 Sup. Ct. Rep. 369.) In that case the court said: "The plaintiff started to run beside the train, and as he did so, turned and fell, one or more wheels passing over his arm." From this brief recital of facts, it will be seen that in that case the facts were very similar to the facts in the case at bar. There also the ground of negligence was the failure of the railroad company to erect a fence. The above case (decided in favor of the plaintiff) was also cited with approval in *Conway v. Monidah Trust Co.* The cases upon this point are so numerous that we will not attempt to cite them all, but will merely refer to the brief in *Erickson v. Great Northern Ry. Co.*, 82 Minn. 60, 83 Am. St. Rep. 410, 51 L. R. A. 645, 84 N. W. 462. There is no footnote in the above case, but in the brief which is set out we find the following heading: "Wherever such a statutory duty is imposed upon a person the failure to exercise that duty is negligence, and a ground for action by any person injured thereby." Then under this heading a vast number of cases are cited, but we will not encumber our brief

with the cases so cited, as your honors have this set of reports. In the *Erickson Case* above cited, the plaintiff did not prevail, because he did not negative certain propositions. The case is nevertheless in point, for it discusses all the points involved in the case at bar.

Defendants seem to contend that because the accident happened within the limits of an unincorporated village, the law does not apply, but the contrary has been decided, to-wit, the duty of fencing under such law applies within the limits of an unincorporated city. (*Greeley v. St. Paul etc. Ry. Co.*, 33 Minn. 136, 53 Am. Rep. 16, 22 N. W. 179.) Neither is it a defense that the accident took place within the yard limits of the railroad company. (*Nickolson v. Northern Pac. Ry. Co.*, 80 Minn. 508, 83 N. W. 454.) Moreover, under a similar law, in Minnesota, which provided that the railroad company must fence on both sides of its track, the duty was held to inure to the benefit of a child of tender years, where, by reason of the failure to fence, the child was injured. (*Marengo v. Great Northern Ry. Co.*, 84 Minn. 397, 87 Am. St. Rep. 369, 87 N. W. 1117.) Other cases on the same point are as follows: *Keyser v. Chicago etc. Ry. Co.*, 56 Mich. 559, 56 Am. Rep. 405, 23 N. W. 311; *Ellington v. Great Northern Ry. Co.*, 96 Minn. 176, 104 N. W. 827; *Chicago etc. Ry. Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522; *Stuetzgen v. Wisconsin Cent. Ry. Co.*, 80 Wis. 498, 50 N. W. 407; *Baltimore etc. Ry. Co. v. Cumberland*, 176 U. S. 232, 44 L. Ed. 447, 20 Sup. Ct. Rep. 380.

Mr. John G. Skinner, for Respondents, submitted a brief and argued the cause orally.

Citing, with reference to the insufficiency of the complaint: *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373; *Egan v. Montana Cent. Ry. Co.*, 24 Mont. 569, 63 Pac. 831; *Beinhorn v. Griswold*, 27 Mont. 79, 94 Am. St. Rep. 818, 59 L. R. A. 771, 69 Pac. 557; *Smalley v. Rio Grande etc. Ry. Co.*, 34 Utah, 423, 98 Pac. 311; *Ling v. Great Northern*, 165 Fed. 813; *Hastings v. Southern Ry.*, 143 Fed. 260, 5 L. R. A. (n. s.) 775, 14 C. C. A. 398; *Cleve-*

land etc. Ry. Co. v. Tartt, 64 Fed. 830, 12 C. C. A. 618; *Smith v. Hopkins*, 120 Fed. 921, 57 C. C. A. 193; *McCabe v. American Woolen Co.*, 124 Fed. 283; affirmed, 132 Fed. 1006, 65 C. C. A. 59.

MR. JUSTICE SANNER delivered the opinion of the court.

The plaintiff elected to stand upon his complaint after a general demurrer thereto had been sustained. Judgment for the defendants was entered, and this appeal is the result

The material allegations of the complaint, pleaded as one cause of action, may be epitomized as follows: That the plaintiff is the father of Emma Nixon, who was run over and killed by one of defendants' trains on December 5, 1912; that at and for some years prior to that time the defendant company was engaged in operating a railway through Bear Creek, an unincorporated village in Carbon county; that it was the duty of said company to maintain on both sides of its track a good and legal fence and to keep at its crossings cattle-guards over which cattle and other domestic animals could not pass, but in this duty it wholly and negligently failed; that at the time of the accident Emma Nixon was eight years old and resided about one and one-half miles west of Bear Creek, south of the company's track; that she, together with a great number of other children residing in the same neighborhood, attended school at Bear Creek, north of the track; that because of defendants' failure to maintain a good and legal fence it became and was the custom of such children to walk upon said track, particularly between 3 and 5 P. M. of each day, except Saturdays and Sundays, and said track, for many years prior to the date of the accident, had been used as a common highway for pedestrians en route to and from Bear Creek, all of which was well known to the company; that it was also a common custom for such children, when returning from school by way of said track, to attempt to ride upon the rear end of the trains traveling thereon, especially if such trains were moving slowly, and this the defendants well knew; that at the time of the accident one of the company's trains was moving slowly between Bear Creek and the residence of Emma Nixon,

which train consisted of nine cars, two of which cars were placed in an unusual position, to-wit, behind the caboose; that said train, so made up and so moving, was attractive to children and was dangerous; that defendants should have known these facts, and should have known that such children would attempt to ride said train, and should, in the exercise of ordinary care, have placed some person upon the rear thereof, to prevent such children riding thereon; that defendants failed to do that, or to do anything in that behalf; that Emma Nixon, and other children, entered said track at a point where it was the duty of defendants to have kept a fence, and, being upon said track to the knowledge of defendants, was attracted by the train so made up and slowly moving, and was thereby impliedly invited to ride the rear thereof, and attempted to do so, being too young to appreciate the danger; that her death was the result of that attempt.

The question presented is whether a cause of action is stated in the foregoing facts, bearing in mind that the complaint stands confronted only by a general demurrer, and that the duty of this court is to search it from end to end and determine whether its sufficiency can be reasonably asserted upon any theory. The appellant insists that a cause of action is stated under (1) the statutory duty imposed upon railway companies to fence, and (2) under the common-law duties arising upon implied invitation.

1. The application to this case of the statutory duty imposed upon railway companies to fence is erroneously assumed in con-[1] sequence of the decision of this court and some authorities cited in *Conway v. Monidah Trust*, 47 Mont. 269, 132 Pac. 26. A moderately discriminative reading of that case should have satisfied counsel that it not only does not sustain his view, but makes directly against it. We there dealt with a statutory provision the manifest purpose of which was to impose an absolute duty for the protection of persons, for the benefit, not of a class, but of the entire public considered as a composite of individuals; we took pains to distinguish those statutes which impose a duty for the benefit of the public considered as a com-

posite of individuals, from those statutes which impose a duty for the benefit of a particular class, and we held that in the one case a right of action may arise in favor of any person especially injured by a failure in such duty, while in the other a right of action could accrue only to a person of the contemplated class. The fencing statute invoked as a basis of liability in this case, is as follows: "Railroad corporations must make, and maintain a good and legal fence on both sides of their track and property, and maintain, at all crossings, cattle-guards over which cattle or other domestic animals cannot pass. In case they do not make and maintain such fence and guards, if their engines and cars shall kill or maim any cattle or other domestic animals upon their line of road, they must pay to the owner of such cattle or other domestic animals, in all cases, a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. Provided, that nothing herein shall be construed so as to prevent any person, or persons, from recovering damages from any railroad corporation for its negligent killing or injury to any cattle, or other domestic animals, at spurs, sidings, Y's, crossings and turntables." (Sec. 4308, Rev. Codes.) This language, as well as the history of the section, demonstrates that its enactment was for the particular benefit of a particular class. In every case where liability exists because of failure to perform a specific duty, there is involved the proposition that no liability exists when such duty has been performed; but the notion that the legislature intended compliance with this statute to absolve from liability for injuries to children is beyond the pale of discussion.

2. The argument upon implied invitation is, like the complaint, of rather mixed complexion. At one time the invitation is implied from custom, at another from attraction under the so-called "turntable doctrine," and often it is directed to the presence of the child near the track, instead of to her attempt to board the train. The extent to which the turntable doctrine has been accepted in this state, and how it may be invoked, are disclosed in *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373, and

in *Gates v. Northern Pacific Ry. Co.*, 37 Mont. 103, 94 Pac. 751. The effect of these cases is to hold that, while an invitation may be implied from the maintenance, by the owner, of dangerous machinery upon his premises, which is so especially and unusually alluring to children of tender years that they are attracted thereby to the knowledge of the owner, he may nevertheless conduct his business on his own premises with such machinery, operated in such manner as may be necessary and convenient to make his business successful; and, if it does not appear but that the machinery or the use thereof was proper, necessary and convenient, and that it was especially and unusually attractive to children, and that its unusual attractiveness to children was known, or should have been known, to the owner, no cause of action under the turntable doctrine is stated. As elucidating some of the circumstances to which this doctrine cannot be applied, we incorporated in the *Driscoll Case* certain expressions of the supreme court of Texas in *San Antonio etc. Ry. Co. v. Morgan*, 92 Tex. 98, 46 S. W. 28, including the following: "It has been contended broadly that when an owner places * * * anything upon his property which is attractive to others and one is thereby induced to go thereon, the invitation may be inferred as a fact by the court or jury. Now, since it is manifest that to some classes of persons, such as infants, the things ordinarily in existence and use throughout the country, such as rivers, creeks, ponds, wagons, axes, plows, woodpiles, haystacks, etc., are both attractive and dangerous, it is clear that the adoption of such a broad contention would be contrary to reason, lead to vexatious and oppressive litigation, and impose upon the owners such a burden of vigilance and care as to materially impair the value of property and seriously cripple the business interests of the country. Therefore it has been generally held that the invitation cannot be inferred in such cases."

Analyzing the complaint, we observe that the attraction was a train, the only unusual feature of which was that two cars [2] were behind the caboose. It is alleged that defendants knew, or ought to have known, that the children, including

Emma Nixon, would be attracted by the train; but it is not alleged that this train, or trains, so made up, were any more attractive than other trains. The mere fact that trains, as such, are attractive does not suffice; for they are familiar objects and, whether moving rapidly or slowly, they are necessary instrumentalities through which a railroad must conduct its business. So, too, the placing of cars behind the caboose may have been quite reasonable and proper. In any event, there is no intimation in the complaint that from previous practice, or otherwise, the company or its agents knew, or should have known, that a train so made up was especially alluring to children. No reason is suggested why this should be so, and the other allegations strongly indicate that such was not the fact. In no jurisdiction, so far as we are informed, in which the turntable doctrine is accepted, has it been applied to moving trains. (*Underwood v. Western etc. R. R. Co.*, 105 Ga. 48, 31 S. E. 123; *Wilson v. Atchison etc. Ry. Co.*, 66 Kan. 183, 71 Pac. 282; *Catlett v. St. Louis etc. Ry. Co.*, 57 Ark. 461, 38 Am. St. Rep. 254, 21 S. W. 1062.) The complaint cannot be sustained upon this theory.

It is not necessary to canvass the averments touching the implied invitation to Emma Nixon and her companions to be upon or near the track at the time and place of the accident. Suffice it to say that they were there, and the complaint contains enough to charge that they were there by invitation to use the track as a highway, implied, not from want of a fence, but from custom. It was therefore the duty of the company to expect their presence and to operate the dangerous instrumentalities of its business accordingly. This, however, is not important, because Emma Nixon was not killed while she was on the track using it as a highway; she was killed in consequence of her attempt to board a moving train. Her presence near the track was, of course, necessary to an attempt to board a train, but a license to use the track as a highway does not carry with it an invitation to use the track for other purposes, or to board the company's trains, or to use any of its other property.

Assuming, but not deciding, that an invitation to children to [4] board its moving trains can be implied from toleration by the company of previous attempts so to do, we may, by piecing

an averment here with an averment there, say that such an invitation is sufficiently alleged. To make it available to the plaintiff, however, we should be obliged to ignore the plain meaning of paragraphs 13 and 15. In these paragraphs we are expressly told that the invitation upon which the fatal attempt was made was the invitation implied from the attractive character of the train, and we are inferentially informed that the attempt was not made upon any other invitation.

The ruling complained of was correct, and the judgment appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE HOLLOWAY, being absent, did not hear the argument, and takes no part in the foregoing decision.

FADDEN, APPELLANT, v. BUTTE MINERS' UNION NO. 1
ET AL., RESPONDENTS.

(No. 3,441.)

(Submitted November 14, 1914. Decided December 12, 1914.)

[147 Pac. 620.]

Appeal—New Trial Order—Affirmance, When.

1. An order, general in terms, granting a motion for a new trial, the notice of intention to move for which specified all the statutory grounds, will not be disturbed on appeal where the record shows a sharp conflict in the evidence on the issue tried.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by Thomas Fadden against the Butte Miners' Union No. 1 and others. Judgment for plaintiff, and from an order granting a new trial, he appeals. Affirmed.

Mr. Chas. G. Colby, for Appellant, submitted a brief; Mr. Jesse B. Roote, of Counsel, argued the cause orally.

Mr. William Meyer, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Thomas Fadden brought this action in the district court of Silver Bow county against the Butte Miners' Union No. 1, Dennis Murphy, Joseph Penhall and John Hartigan, to recover damages for a malicious assault alleged to have been made by them upon him. The defendants, other than Murphy, stood upon a denial; Murphy coupled his denial with an affirmative plea to the effect that Fadden, after maliciously assaulting Penhall, attempted to assault him (Murphy) and he, to protect himself, struck Fadden. This was denied by the reply. The issues were tried to a jury who returned their verdict for the plaintiff, and judgment was entered thereon. Notice of intention to move for a new trial, specifying all the statutory grounds, was given and the motion itself was heard upon a bill of exceptions which embodied all the evidence. The motion was granted by an order general in its terms. This appeal is from that order, and our duty is to affirm it, if it can be upheld on any of the specified grounds.

We have read the record and can understand how the jury could return that the assault had been committed as alleged; [1] but it must be acknowledged that the testimony is sharply conflicting upon this point. The question in the first instance was for the jury, and, upon motion for new trial, for the judge who saw the witnesses on the stand. If he was satisfied, as he may have been, that the preponderance of the evidence was not with the plaintiff, it was his duty to set the verdict aside. With such an order made under such circumstances we may not interfere. (*Harrington v. Butte & Boston Min. Co.*, 27 Mont. 1, 69 Pac. 102; *Kelly v. City of Butte*, 43 Mont. 451, 117 Pac. 101.)

The order appealed from is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

EDER, RESPONDENT, v. CROWN BUTTE CANAL &
RESERVOIR CO., APPELLANT.

(No. 3,426.)

(Submitted November 10, 1914. Decided December 16, 1914.)

[145 Pac. 1.]

Appeal and Error—Complaint—Sufficiency—Conflict in Evidence—Verdict—Conclusiveness.

Appeal and Error—Complaint—Sufficiency—Review.

1. As against the general objection, made for the first time on appeal, that the complaint in an action for damages to agricultural land because of the negligent construction, maintenance and operation of an irrigating canal, did not state a cause of action, the pleading held sufficiently specific to support a judgment for plaintiff.

Same—Conflict in Evidence—Verdict—Conclusiveness.

2. Where the evidence on every issue involved was conflicting, the verdict of the jury, approved by the lower court by its action in denying a retrial, will not be disturbed on appeal under an assignment that the evidence was insufficient to support it.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Sophia Eder against the Crown Butte Canal & Reservoir Company. Judgment for the plaintiff, and defendant appeals from it and an order denying a new trial. Affirmed.

Mr. Massena Bullard, for Appellant, submitted a brief and argued the cause orally.

For Respondent, there was a brief by *Messrs. W. C. Packer* and *A. P. Heywood*, and oral argument by *Mr. Packer*.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In this action the plaintiff recovered a judgment for damages for injury alleged to have been caused to her agricultural lands by water escaping by seepage from defendant's irrigation canal which passes over said lands, and by overflow water from a spillway in the canal. The canal was constructed by the defendant

to divert water from Sun river to irrigate lands lying along the south side of the river in Lewis and Clark county. The lands in controversy lie between the river and the canal. It is alleged that the injury suffered by plaintiff was due to the negligence of the defendant in the construction, maintenance and operation of the canal, whereby the water escaping therefrom has rendered a large portion of her lands so wet and swampy as to be unfit for cultivation. The defendant has appealed from the judgment and an order denying its motion for a new trial. Of the several assignments of error in his brief, counsel has argued only two, viz., that the complaint does not state a cause of action, and that the evidence is insufficient to justify the verdict.

It is said that the plaintiff's right of recovery is predicated [1] upon negligence which she has not alleged. The sufficiency of the complaint was not tested in the trial court by demurrer or other appropriate method. If it be conceded that the allegations imputing negligence to the defendant are not as direct and definite as they might have been, they are sufficient as against a general objection, made in this court for the first time, to support the judgment.

The transcript of the evidence is voluminous. It would serve [2] no useful purpose to set it forth at length and enter upon an analysis of it. Having made an attentive study of it, we find that it presents a sharp conflict upon every issue involved. This is particularly true of that portion of it tending to show the condition of the plaintiff's lands, by way of comparison before and after the construction of the canal. There was a direct conflict in the testimony of the witnesses upon this subject. This is true, in equal measure, of the testimony upon the question whether the defendant so constructed the canal as to guard the plaintiff's lands from injury from it by water escaping, either by seepage or overflow from it, and has since used due care to maintain it in that condition. The evidence as to the damages is not so definite as it might have been; but, upon the assumption that the plaintiff made out a *prima facie* case of damage

caused by defendant's negligent maintenance and operation of its canal, the amount of the verdict is well within the estimates of the different witnesses. This being the condition presented by the evidence, it was the exclusive province of the jury to determine the issues, subject to discretionary review of its conclusion by the trial judge on motion for a new trial. As has been so often said, with the result thus reached, this court may not interfere.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

SUBURBAN HOMES CO., RESPONDENT, v. NORTH ET AL.,
APPELLANTS.

(No. 3,440.)

(Submitted November 14, 1914. Decided December 16, 1914.)

[145 Pac. 2.]

Vendor and Purchaser—Contract of Sale—Cancellation—Rescission—Part Payments—Improvements—Recovery Back—Forfeitures—Waiver—Tender of Deed—Complaint.

Vendor and Purchaser—Contract of Sale—Cancellation—Restoration of Part Payment—Complaint.

1. A vendor seeking the aid of a court of equity to have a contract of sale of land canceled as a cloud upon his title, it having been breached by the purchaser by his failure to make payment of installments as they fell due, need not, as he would be compelled to do in an action to rescind, allege in his complaint that he has restored, or offered to restore, partial payments theretofore made.

[As to return of consideration on repudiation of void contract, see note in Ann. Cas. 1914C, 898.]

Same—Recovery of Part Payments, When.

2. As a general rule, the law forfeits to the vendor—the innocent party—all payments made in part performance by the purchaser—the defaulting party—when the latter stops short of full performance by failure to make full payment; where, however, the latter can allege and prove that his default was not the result of his grossly negligent, willful or fraudulent breach of duty, he may recover payments made prior to the breach, provided he make full compensation to the vendor.

Same—Improvements on Land—Recovery, When.

3. To entitle a defaulting purchaser to reimbursement for improvements made on the land, a contract of sale of which plaintiff seeks to have rescinded, he must make a showing of some equitable basis for it, as, for instance, that the improvements were within the contemplation of the parties when the contract was made, etc.

Same—Improvements—Measure of Recovery.

4. In the absence of some provision in a contract of sale of land fixing a different measure of compensation for improvements placed thereon by the purchaser, the amount recoverable for them is not what it cost to put them on the land, but the enhanced value of the property, not exceeding the amount expended for the improvements, deducting an amount equal to the fair rental value of the premises.

Same—Time Essence of Contract—Forfeitures—Waiver.

5. A stipulation in a contract of sale of real estate making time of the essence, and reserving an option to the vendor to terminate the contract for failure of the purchaser to pay any required installments of the purchase price, may be waived by the vendor.

Same—Forfeitures—Duty of Vendor.

6. Default in the payment of any installment of the purchase price called for in a contract of sale of real estate is a distinct breach, and gives the vendor a right to declare a forfeiture as stipulated in the contract; but the right must be promptly exercised, or the vendor will be presumed to treat the contract as still valid and existent.

Same—Default in Payment—Rights of Vendor.

7. A vendor who grants time to the purchaser to pay installments of the purchase price, though the contract makes time of the essence and stipulates for a forfeiture for nonpayment of any installment at maturity, may, on the default continuing, demand payment of the balance due and give notice of his purpose to terminate the contract in the event of further default; and where the purchaser after such notice does not pay within a reasonable time, the vendor may terminate the contract.

Same—Cancellation—Tender of Deed—Failure to Allege—When Immaterial.

8. Where plaintiff, in an action to cancel a contract of sale of land, tendered a deed at the trial, and defendant failed to make payment of the balance due on the purchase price, the latter was in no position to claim error because of plaintiff's omission to allege in his complaint that demand upon defendant for payment was accompanied by a deed.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by the Suburban Homes Company against Austin North and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Cause submitted on briefs of counsel.

Messrs. Goddard & Clark, for Appellants.

The complaint failed to allege a tender or offer to pay the defendants the moneys which they had paid on the contract and

return to the defendants the interest paid by them, about \$5,870, which was paid on deferred payments. This action being one to forfeit or rescind the contract, it comes within the provisions of subdivision 2 of section 5065 of the Revised Codes. (*Cotter v. Butte & Ruby Valley S. Co.*, 31 Mont. 129, 77 Pac. 509.) The rescission of a contract, in order to be effectual, must be a rescission *in toto*. The principle contended for has been sustained in numerous cases, among which are *White v. Buell*, 90 Cal. 177, 27 Pac. 19, which affirms *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280. (See, also, *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774.)

It is the general principle, well recognized, that no contract can be rescinded by one of the parties unless both can be restored to the condition in which they were before the contract was made. The party rescinding must put the other *in statu quo*. (2 Parsons on Contracts, 6th ed., 678.)

In this case the court, in its first conclusion of law, found that by reason of plaintiff having received payment on the contract, extending over more than five years after default of payments, the plaintiff waived its right to take advantage of the clause in the contract making time the essence of the contract, and we find no fault with this finding. In the case of *Miller v. Steen*, 30 Cal. 403, 89 Am. Dec. 124, it is held that where time is not of the essence of the contract, and default is made in one or more of the payments, the vendor is not entitled to have the money and property already paid by the vendee. It is also held in that case that if the vendor rescinds, he must put the vendee *in statu quo* by returning the portion of the purchase money paid.

When the vendee has paid part of the purchase money and given his notes for the balance, before the vendor can rescind a contract he must return or offer to return money paid, with legal interest less reasonable rental of the premises, if the vendee has been in possession, and also all unpaid notes. (*Frink v. Thomas*, 20 Or. 265, 12 L. R. A. 239, 25 Pac. 717.) In this case there is not evidence of any rental value of the premises. Re-

spondent seeks to enforce a forfeiture, and under the ruling of equity applicable to such cases, a forfeiture will not be enforced, and in a proper case equity will interpose to prevent the enforcement of the forfeiture at law. (*Keller v. Lewis*, 53 Cal. 113.)

The failure of the vendee, under a contract for the sale of land, to pay the purchase price within the time stipulated or to perform other conditions of the contract is no ground for a decree in equity and declaring a forfeiture of his rights. The court of equity will never enforce a penalty or forfeiture. (*McCormick, Admr., v. Rossi*, 70 Cal. 474, 15 Pac. 35.)

Messrs. Johnston & Coleman, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On March 17, 1905, the plaintiff and the defendant Austin North entered into a contract under the terms of which the plaintiff agreed to sell to this defendant a number of blocks and lots situated in the city of Billings and Foster's addition thereto, in Yellowstone county. The consideration for the contract was the sum of \$25,000, to be paid by North in installments as follows: \$1,000 in cash upon the execution of the contract, \$5,000 on March 17, 1907, a like sum on March 17, 1908, and the balance of \$10,000 on March 17, 1909, with interest on any installment not paid when it should become due at the rate of 8 per cent per annum, payable on March 17 of each year. The defendant was to pay all taxes and assessments, ordinary and extraordinary that might be subsequently levied and assessed against the property or any part of it. Upon default by defendant in the payment of any installment of the purchase price or interest thereon, or of any taxes or assessments upon the property, plaintiff might, at its option, declare the contract null and void and no longer binding upon it. In such case the property, together with all payments, should thereupon be and remain the property of the plaintiff, its successors and assigns, the defendant thereafter to have no right or interest therein or right of action to recover it or any installment of the purchase money

theretofore paid. Time was expressly made of the essence of the contract. It was further agreed that in case the defendant defaulted in the performance of any of the stipulations of the contract, and the plaintiff elected to exercise its option to declare it null and void because of such default, such declaration should be made by written notice directed to the defendant and deposited in the postoffice at Billings. Upon the performance by the defendant of all the stipulations of the contract on his part, he became entitled to a conveyance with the usual covenants of warranty. Except the cash payment and the installment due on March 17, 1906, the defendant failed to pay any of the installments as they fell due, or at all. He did make payments of interest in amounts not exceeding \$600 at any one time, down to April 23, 1912, when the last payment was made. On June 5, 1912, the plaintiff made written demand for payment of the balance then due, amounting to \$25,983.33. In this demand the defendant was informed that, if he did not make payment on or before July 10, 1912, the plaintiff would treat the contract as null and void and would bring an action to have it canceled. Defendant was further informed that the plaintiff would also ask for the cancellation of a deed executed to defendant by Yellowstone county to the streets and alleys contiguous and adjacent to the property covered by the contract. The defendant having failed to comply with this demand, the plaintiff on July 27 notified him by mail, through the postoffice at Billings, that it had elected to terminate the contract because of his failure to comply with its demand, and thereupon brought this action to have the contract and deed canceled. After reciting the foregoing facts, the complaint alleges that the taxes and assessments levied upon the property for the years 1910 and 1911 are due and unpaid; that if the contract between the plaintiff and defendant North be left outstanding, it may cause serious injury to plaintiff, in that it would appear as a cloud upon his title; and that the defendant Hattie North is the wife of defendant Austin North. The relief demanded is that the defendants be decreed to have no right or interest in

the property, and that plaintiff's title thereto be decreed good and valid, that said defendants be enjoined from claiming any interest therein, that the contract between plaintiff and defendant Austin North be ordered delivered up for cancellation, and that the plaintiff recover its costs.

The answer does not controvert any of the material allegations in the complaint, except that it is denied that the plaintiff made written demand upon North for payment of the balance of the purchase price, or that it thereafter gave notice of its election to forfeit the contract. It does not allege facts upon which defendant seeks affirmative relief. It states as separate defenses the following: (1) That after the execution of the contract the defendant North paid to the plaintiff \$10,870, but that plaintiff did not at any time prior to the bringing of the action offer to repay to the defendant this amount or any part of it; (2) that after defendant went into possession he expended large sums of money in installing a water supply, in grading the streets and alleys, and otherwise improving the property, but that plaintiff did not, before commencing the action, pay to the defendant the money so expended, or any portion thereof; (3) that after default by defendant in making payment, the plaintiff accepted various payments from him, applying the same upon the contract without objection; that by this conduct it had led the defendant to believe that it intended to extend the time of payment fixed in the contract, and that it thereby waived its right and estopped itself to declare forfeiture of the contract under the stipulation therein; and (4) that plaintiff at no time before commencing the action offered to restore to the defendant the benefits it had received under the contract.

The findings of fact and conclusions of law by the trial court. were in favor of plaintiff, and a decree was entered awarding it the relief demanded. The defendants North have appealed from the decree and an order denying their motion for a new trial. A recital of the facts relating to the deed from Yellowstone county has been omitted from the foregoing statement, for the reason that no appearance was made at the trial by the

defendant commissioners, and the propriety of the relief granted in this behalf is not brought in question in this court.

1. The first contention made is that the court erred in overruling defendants' objection to the introduction of evidence. It [1] is said that, since the apparent purpose of the action is to enforce a rescission of the contract, it was incumbent upon plaintiff to allege that it had restored, or offered to restore, to the defendant Austin North everything of value received from him in part performance of the contract, *viz.*, payments made by him. This contention is based upon a misconception of the scope and purpose of the action. Rescission requires the party seeking to rescind to restore, or offer to restore, to the other party everything of value received by the former under the contract, upon condition that the latter will do likewise. (Rev. Codes, sec. 5063; *Clark v. American Dev. & Min. Co.*, 28 Mont. 468, 72 Pac. 978; *Cotter v. Butte & Ruby Valley S. Co.*, 31 Mont. 129, 77 Pac. 509.) If he seeks the aid of a court of equity, he must aver that he has done this, or set forth excusatory facts. Such is not the purpose of this action. Plaintiff seeks to have the contract canceled as a menace to his title, having asserted his right under the express stipulation therein to declare it no longer binding upon him because of a breach of it by the defendant. While both actions are of equitable cognizance, they are wholly different in their scope and purpose, and the rules applicable to the one have no application to the other. (*Cook-Reynolds Co. v. Chipman*, 47 Mont. 289, 133 Pac. 694; *Fratt v. Daniels-Jones Co.*, 47 Mont. 487, 133 Pac. 700.) In this sort of action the complaint need not contain any allegation on the subject of restoration.

The same may be said of the contention that the purpose [2] of the action is to enforce a forfeiture, and therefore cannot be sustained. Plaintiff does not ask that the court declare a forfeiture of the amounts paid by the defendant, nor does the decree adjudge the rights of the parties in this behalf. It merely declares that the plaintiff is entitled to be restored to its rights as they existed prior to the execution of the contract,

and that the instrument—the only evidence of any right in defendant—be delivered up for cancellation, so that it may not hereafter be a source of embarrassment to the plaintiff, as a standing menace to its title. It leaves the question whether the defendant is entitled to recover his payments, or any part of them, wholly unadjudicated. As was pointed out in *Clifton v. Willson*, 47 Mont. 305, 132 Pac. 424, one who has been guilty of a breach of his contract, by stopping short of full performance, cannot ordinarily recover payments, or any part thereof, made prior to the breach; nor can he do so under any circumstances, unless, within the rule of the statute, upon full compensation to plaintiff (Rev. Codes, sec. 6039), he can allege and prove that the default was not the result of his “grossly negligent, willful or fraudulent breach of duty.” The right to recover in such case is an exception to the general rule that the law forfeits to the innocent party all payments made, or the value of acts done, in part performance by the other party, when he stops short and refuses to proceed to the ultimate conclusion. (*Perkins v. Allnut*, 47 Mont. 13, 130 Pac. 1; *Cook-Reynolds Co. v. Chipman*, *supra*; *Fratt v. Daniels-Jones Co.*, *supra*.)

3. It is contended that the decree cannot stand because the complaint contains no allegation on the subject, and the evidence [3] shows conclusively that the defendant spent a large sum in installing improvements upon the property, which the plaintiff did not pay or tender to him before the commencement of the action. Here again the defendant proceeds upon the assumption that the purpose of the action is to have adjudicated a rescission of the contract. Even were this its purpose, the defendant is not entitled to relief in this behalf, in the absence of a showing of some equitable basis for it, as, for instance, that the improvements were within the contemplation of the parties when the contract was made, and that complete performance has not been prevented by his grossly negligent, willful, or fraudulent breach of his obligation. If he has equities, he must assert them (*Moore v. Giesecke*, 76 Tex. 543, 13 S. W. 290), and unless he does so he is not entitled to reimbursement. Otherwise, the

vendor, though without fault, could exercise the option reserved in the contract only by paying for the privilege. (*Moore v. Giesecke, supra*; *Banks v. McQuatters* (Tex. Civ. App.), 57 S. W. 334; *Coleman v. Stalnacke*, 15 S. D. 242, 88 N. W. 107.) In *Moore v. Giesecke, supra*, the court said: "When the vendor's suit is predicated upon the mere refusal of the vendee to pay the whole consideration contracted for, the fact that the vendee has paid part of the consideration and made * * * valuable improvements, coupled with possession of the property, unaided by some other sufficient equity, will not entitle him to recover for such purchase money or improvements. In such cases, when the vendor has neither waived his legal rights nor committed any default, he cannot be involuntarily taxed with improvements made upon his property without his consent, or be made to pay a price for recovering it back."

As already stated, the assumption of counsel for defendant has no basis in fact. The answer does not allege facts to justify, nor does the prayer demand, affirmative relief of any kind. It is defensive merely, and alleges only matter which goes to the sufficiency of the complaint, from the viewpoint of counsel. Therefore a case is not presented warranting relief to the defendant. In order to avoid the consequences of his default, we can see no reason why the defendant should not be required to bring himself within the equity of the statute as interpreted in *Cook-Reynolds Co. v. Chipman*, *Fratt v. Daniels-Jones Co.*, and other cases cited above.

Apart from these considerations, there is not in the record any evidence touching the value of the improvements, other than [4] the testimony of witnesses as to what they cost in actual outlay. Nor does the evidence disclose whether they were made exclusively for the benefit of the property covered by the contract, or were designed in part to improve other property in the vicinity belonging to the defendant North. Upon this evidence the court would not have been justified in making a finding as to their value. "In the absence of some provision in the contract fixing a different measure of compensation, the amount

recoverable for improvements is not what it cost to put them on the property, but the enhanced value of the property, not exceeding the amount expended for the improvements, and from them is to be deducted an amount equal to the fair rental value of the premises." (39 Cyc. 1403; see, also, *Conlan v. Sullivan*, 110 Cal. 624, 42 Pac. 1081; *Glass v. Hampton* (Ky.), 122 S. W. 803; *Guthrie v. Holt*, 9 Baxt. (Tenn.) 527; *Herring & Bird v. Pollard's Exrs.*, 4 Humph. (Tenn.) 362, 40 Am. Dec. 653; *Bond v. Wilson*, 129 N. C. 325, 40 S. E. 179.) So far as the evidence discloses, the amounts expended by the defendant did not add a penny's worth to the value of the property, nor can it be ascertained therefrom what part of the outlay was made for the benefit of it, as distinguished from other property of defendant in the immediate vicinity.

4. Although by its express terms time is made of the essence of a contract, and an option is reserved by the vendor to declare it terminated for failure to pay the purchase price at the date [5] it falls due, or, if it is payable in installments, at the date that any one of the installments falls due, this provision may be waived by a failure to exercise the option, or by accepting a payment after it is due. The vendor cannot thereafter allege such default as a ground for declaring the contract terminated. (Pomeroy on Contracts, sec. 357; 2 Warvelle on Vendors, sec. 820; *Grigg v. Landis*, 21 N. J. Eq. 494; *Boone v. Templeman*, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947.) If payment is to be made in installments, default in the payment of any [6] installment is a distinct breach and gives the vendor the right to declare a forfeiture. The right must be promptly exercised, however; otherwise, the right being exclusively that of the plaintiff, he will be presumed to regard the contract as still valid and existent. On this subject Mr. Warvelle says: "In the absence of other circumstances, nothing can be predicated upon a mere neglect of the vendor to declare a forfeiture at the time such right accrues; and the fact that the vendor has before indulged the vendee by accepting payments after they were due furnishes no excuse for his not meeting the other pay-

ments promptly, nor will it operate to prevent the vendor from declaring a forfeiture. It would seem, however, that where a forfeiture has been practically waived by partial payments by the vendee after the time prescribed, the vendor cannot then suddenly stop short and insist upon a forfeiture for the non-payment of the arrears remaining unpaid, without any previous notice of his intention so to do if the arrears are not paid. Indeed, the fact of indulgence is a strong circumstance tending to show that neither party intended that a failure to perform the contract according to its terms, at the time specified, should forfeit the right of the party failing to have a specific performance; and where the vendor suffers the purchaser to remain in possession of the property, and receives payments from him down to within a short period of declaring a forfeiture, such payments aggregating a large portion of the purchase price, he will, it seems, not be permitted to insist upon a forfeiture without first giving notice to the vendee and allowing him a reasonable time to perform on his part." (2 Warvelle on Vendors, sec. 820.) Where the indulgence has been extended until long after all the installments are due, nonpayment alone will not justify a forfeiture. (*Boone v. Templeman*, *supra*; *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558.) But, though the vendor has extended indulgence to the vendee, he is not required to wait [7] indefinitely for the vendee to perform his obligation. If the latter continues in default, the vendor, by demand for payment of the balance of the purchase money and notice of his purpose to terminate the contract in case of further default, may put the vendee upon his guard. If after such notice he does not make payment within a reasonable time, the vendor may declare the contract at an end. This doctrine was recognized by this court in *Fratt v. Daniels-Jones Co.*, *supra*, and is announced by these cases: *King v. Wilson*, 6 Beav. 126; *Eaton v. Schneider*, 185 Ill. 508, 57 N. E. 421; *Boone v. Templeman*, *supra*; *Maffet v. Oregon & C. R. Co.*, 46 Or. 443, 80 Pac. 489; *Kirby v. Harrison*, 2 Ohio St. 326, 59 Am. Dec. 677; *Mo v. Bettner*, 68 Minn. 179, 70 N. W. 1076; *Gaughen v. Kerr*, 99

Iowa, 214, 68 N. W. 694; *Pier v. Lee*, 14 S. D. 600, 86 N. W. 642; *Walker v. McMurchie*, 61 Wash. 489, 112 Pac. 500.

5. So far as they are questioned by the contentions of counsel, we think the findings of the trial court are amply justified by the evidence and fully support the decree. It is true that it [8] is not alleged that the demand upon the defendant was accompanied by a tender of a deed. A deed was tendered on the trial, however. In view of the failure of defendant to respond to the demand of the plaintiff, as well as his failure to tender payment at the trial and demand a conveyance, the conclusion seems inevitable that he is either unwilling, or, more probably, unable, to meet his obligations under the contract. Such being the case, he is in no position to claim that the plaintiff ought to be denied relief.

The judgment and order are affirmed.

'Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

STATE EX REL. SMOTHERMAN, RELATOR, v. DISTRICT
COURT ET AL., RESPONDENTS.

(No. 3,583.)

(Submitted November 30, 1914. Decided December 18, 1914.)

[145 Pac. 724.]

*Certiorari—Default Judgments—Entry—Order to Strike—Ex-
cess of Jurisdiction—Nonappealable Orders.*

Default Judgments—Entry—Order to Strike—Error.

1. *Held*, on *certiorari*, that where the district court, after overruling a demurrer to an amended complaint, directed an answer to be filed within ten days, and none was filed, though it was served upon counsel for plaintiff within time, entry of default by the clerk upon request of counsel for plaintiff was proper under section 6719, Revised Codes; and that, while the court could, in its discretion and upon a proper showing, set aside the default, it exceeded its jurisdiction in ordering it stricken from the files on the ground that the clerk was without authority in law to enter it.

[As to questions reviewable in *certiorari*, see note in 40 Am. St. Rep. 29.]

Appeal and Error—Nonappealable Orders.

2. An appeal does not lie from an order striking from the files a pleading or other document constituting a part of the record of a cause.

Original application by the State, at the relation of W. D. Smotherman, for writ of *certiorari* to annul an order of the District Court of the Twelfth Judicial District in and for the County of Blaine, Frank N. Utter, Judge. Writ granted.

Mr. W. B. Sands, for Relator, argued the cause orally.

Messrs. O'Keefe & Kuhr, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Certiorari. On August 26, 1912, W. D. Smotherman commenced an action against Charles Christiansen in the district court of Blaine county. Thereafter he filed an amended complaint. The amended pleading alleged twelve separate causes of action for damages for trespass upon lands belonging to plaintiff. The defendant interposed separate demurrers to the several causes of action. On March 16, 1914, Hon. Frank N. Utter presiding, the court after argument sustained the demurrers to the first, second and fourth causes of action; it overruled the others and allowed defendant ten days in which to answer. On the morning of March 27, the defendant having failed to file his answer, counsel for plaintiff filed with the clerk his praecipe for a default. The default was entered immediately by the clerk by filling out and signing a printed blank kept by him for that purpose, and attaching it to the complaint by a stapling machine. On November 10, 1914, the court, on motion of counsel for defendant, ordered the default stricken from the files on the ground that the clerk was "without authority in law to enter it." At the argument of the motion in the district court it was admitted by counsel for the plaintiff that on the afternoon of the day before the default was entered counsel for defendant had served upon him a copy of the answer he intended to file in the action. The purpose of this applica-

tion is to have the order striking out the default, annulled on the ground that the court exceeded its jurisdiction and the relator has no appeal nor other speedy or adequate remedy. Appearance was made in this court for the respondents by motion to quash the writ. on the ground that the facts alleged in the affidavit did not warrant its issuance by this court, and that the petitioner has an adequate remedy by appeal. Upon this motion the application was submitted for final judgment.

It is provided by section 6537 of the Revised Codes that upon the overruling of a demurrer to an amended complaint, the defendant must answer within twenty days or such other time as the court may direct. Judgment by default may be entered for failure to answer, as in other cases. In the case of *Smotherman v. Christiansen* the court directed the answer to be filed in ten days. It was incumbent upon the defendant to file his answer within this time. A service of it upon counsel for plaintiff was not equivalent to filing it with the clerk. Nor did the service preclude counsel from having default entered on the following day, in the absence, of course, of a showing of some act or statement on his part misleading counsel for the defendant into the belief that advantage would not be taken of his lack of promptness in filing the answer. The answer not having been filed, counsel for plaintiff had the right to have default entered, and it became the duty of the clerk upon his application to enter it. (Rev. Codes, sec. 6719.) After it had been entered, the court might, in its discretion and upon a proper showing, but not otherwise, have set it aside and permitted the answer to be filed. (Rev. Codes, sec. 6589.) Evidently, the court was of the opinion that inasmuch as service of the answer had been made, this was sufficient to preclude the entry of default. This conclusion was erroneous. The relator could not arbitrarily be deprived of the advantage gained by entry of default.

Since final judgment had not been entered when the order was made, the relator is without remedy by appeal. No appeal [2] lies from an order striking from the files a pleading or

other document constituting a part of the record of the case. (Rev. Codes, sec. 7098.) Nor has he any other adequate remedy.

The order was in excess of jurisdiction, and is therefore annulled.

Order annulled.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

Rehearing denied January 18, 1915.

WALL, ADMR., RESPONDENT, v. NORTHERN PACIFIC RY.
CO., APPELLANT.

(No. 3,439.)

(Submitted November 13, 1914. Decided December 18, 1914.)

[145 Pac. 291.]

Common Carriers—Livestock—Transportation—Delay—Common-law Duties—Limitation by Special Contract—Validity—Burden of Proof—Variance.

Railroads—Transportation of Livestock—Delay—Common-law Duties—Special Contract—Variance.

1. Under *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642, a shipper of livestock may maintain an action against the carrier for a breach of its common-law duty to transport the cattle to their destination without unreasonable delay, and is not bound to sue as for a violation of the contract of carriage entered into between the parties; hence the contention, that by thus pleading a tort and proving a breach of the contract a fatal variance resulted, has no merit.

[As to liability of carrier for loss of or injury to livestock, see note in 130 Am. St. Rep. 432.]

Same—Common-law Duties—Limitation by Special Contract—Reasonableness.

2. A common carrier may by special contract limit its common-law liability, provided the terms thereof are reasonable; whether they are reasonable depends upon the facts and circumstances of the particular case.

[As to limitation by carrier of its liability by notices in bills of lading, tickets and baggage checks, see note in 5 Am. St. Rep. 719.]

Same—Burden of Proof.

3. Where a common carrier relies upon a special contract to escape liability for a breach of its common-law duty, it must plead and bear the burden of establishing it.

Same—Limitation of Common-law Duty—Unreasonableness.

4. Where a common carrier contracted to transport livestock to a point beyond its own line, a provision that the shipper, as a condition precedent to his right to recover damages for loss or injury to any of the stock, must give notice of his claim in writing to some officer or station agent of the company before the stock had been removed from the place of destination or mingled with other stock, was void for unreasonableness, and therefore not binding upon the shipper in the absence of proof that the initial carrier had an officer or agent at the place of destination to whom such notice might be given.

Same—Cause of Delay—Burden of Proof.

5. Since the movements of defendant's train carrying the plaintiff's cattle were exclusively under its own management and control, and the facts which caused the train to be delayed were peculiarly within the knowledge of its officers and agents, the burden was upon it to show that the delay complained of arose from some other cause than its own negligence.

Same.

6. Upon showing that defendant carrier consumed substantially thirteen days in delivering his cattle at the place of destination over a route usually covered in six or seven days, plaintiff had made a *prima facie* case of negligence on the part of defendant, and was not bound to show that every delay along the route was caused by the negligence of defendant.

'Appeal from District Court, Gallatin County; B. B. Law, Judge.

ACTION by R. P. Wall, as administrator of the estate of R. J. Wall, deceased, against the Northern Pacific Railway Company. Judgment for plaintiff and defendant appeals from the judgment and an order denying it a new trial. Affirmed.

Messrs. Gunn, Rasch & Hall and Messrs. Hartman & Hartman, for Appellant, submitted a brief; Mr. E. M. Hall argued the cause orally.

That a provision in a contract for an interstate shipment requiring written notice of claim before the stock is removed from destination or mingled with other stock is valid and reasonable, was sustained by the trial court, and has been uniformly upheld by the courts. (*St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okl. 302, 135 Pac. 406; *Atchison T. & S. F. R. Co. v. Baldwin*, 53 Colo. 416, 128 Pac. 449; *Mobile & O. R. Co. v. Brownsville Livery etc. Co.*, 123 Tenn. 298, 130 S. W. 788; *Southern Ry. Co. v. Tollerson*, 129 Ga. 647, 59 S. E. 799; *Hatch v. Minneapolis etc. Ry. Co.*, 15 N. D. 490, 107 N. W. 1087; *Atchison etc. Ry.*

Co. v. Coffin, 13 Ariz. 144, 108 Pac. 480; *Central of Georgia Ry. Co. v. Henderson*, 152 Ala. 203, 44 South. 542; *McElvain v. St. Louis etc. Ry. Co.*, 151 Mo. App. 126, 131 S. W. 736; *Cooke v. Northern Pac. Ry. Co.*, 22 N. D. 266, 133 N. W. 303.) Such provisions in contracts, if reasonable, are valid, in interstate shipments, regardless of the provisions of state laws. (*Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. Rep. 148, 44 L. R. A. (n. s.) 257, and note; *Missouri K. & T. R. Co. v. Harriman Bros.*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. Rep. 397; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okl. 302, 135 Pac. 406; *St. Louis & S. F. R. Co. v. Bilby*, 35 Okl. 589, 130 Pac. 1089; *Appel Suit etc. Co. v. Platt*, 55 Colo. 45, 132 Pac. 71; *Southern Nursery Co. v. Winfield Nursery Co.*, 89 Kan. 522, 132 Pac. 149.)

There is a fatal variance between the allegations of the complaint and the proof, in that the complaint states an action in tort, based upon the common-law liability of the carrier, while the plaintiff's evidence shows that said cattle were shipped pursuant to a special contract, in writing. The validity of such contracts, giving a reduced rate of carriage in consideration therefor, has been repeatedly upheld. The recent case of *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okl. 302, 135 Pac. 406, discusses practically all provisions of such contracts, and reviews many of the authorities. (See, also, *Sanden v. Northern Pac. Ry. Co.*, 43 Mont. 209, 34 L. R. A. (n. s.) 711, 115 Pac. 408; *Rose v. Northern Pac. Ry. Co.*, 35 Mont. 70, 119 Am. St. Rep. 836, 88 Pac. 767; *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. Rep. 148, 44 L. R. A. (n. s.) 257, and cases cited in note; *Missouri K. & T. R. Co. v. Harriman Bros.*, 227 U. S. 657, 57 L. Ed. 690, 33 Sup. Ct. Rep. 397.)

Defendant's contention is, that where a valid contract has been entered into, covering the matters of which plaintiff complains in his complaint, namely, delays from various alleged causes, plaintiff must sue on such special contract and not on the common-law liability of the carrier, and that where he pursues the latter remedy, and his proof shows the existence

of such a special contract, there is a fatal variance, amounting to a failure of proof. We are familiar with the case of *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642, which contains certain statements that, on first impression, may appear to be contrary to the defendant's contention here. We submit, however, that that case is distinguishable. In fact, it was reviewed and distinguished in the case of *Cooke v. Northern Pac. Ry. Co.*, 22 N. D. 266, 133 N. W. 303, and we contend that the correct rule applicable to this case is stated in the *Cooke Case*. There a special contract, similar to the one in this case, was involved.

The reasoning of the court in the case of *Cooke v. Northern Pacific Railway Company*, above, is particularly applicable to the special contracts relating to interstate shipments, in view of the recent decisions of the United States supreme court construing such contracts. It follows from the opinion in *Adams Express Co. v. Croninger*, 226 U. S. 491, 57 L. Ed. 314, 33 Sup. Ct. Rep. 148, 44 L. R. A. (n. s.) 257, that the old common-law liability of the carrier no longer measures the liability in interstate shipments, made under special contracts at a reduced rate of carriage. The property is carried only on the terms of the special contract, and the carrier is liable only for its own negligence or that of its servants or that of the connecting carrier or its servants, from which negligence it cannot, of course, exempt itself.

Under a contract such as the one at bar, whereby the shipper assumes the risks for delays and agrees that the defendant is liable for delays, *etc.*, only when caused by the negligence of the defendant or connecting carrier, the burden is on the plaintiff, not only to prove unusual delays, but that they were due to such negligence. (See *Sherwood v. New York, O. & W. Ry. Co.*, 86 Hun, 556, 33 N. Y. Supp. 771; *Decker v. Missouri Pac. Ry. Co.*, 149 Mo. App. 534, 131 S. W. 118; *Clark v. St. Joseph & G. I. Ry. Co.*, 138 Mo. App. 424, 122 S. W. 318; *McDowell v. Missouri Pac. Ry. Co.*, 167 Mo. App. 576, 152 S. W. 435; *Sterling v. St. Louis I. M. & S. Ry. Co.*, 38 Tex. Civ. App. 451, 86 S. W.

655; *Peterson v. Chicago, Milwaukee etc. Ry. Co.*, 19 S. D. 122, 102 N. W. 595; *Illinois Central Ry. Co. v. Word*, 149 Ky. 229, 147 S. W. 949; *Bartelt v. Oregon R. & Nav. Co.*, 57 Wash. 16, 135 Am. St. Rep. 959, 106 Pac. 487.)

Mr. Walter Aitken, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On January 2, 1912, R. J. Wall shipped four carloads of beef cattle from Belgrade, Montana, to the Chicago market over the Northern Pacific Railway as the initial carrier. The shipment did not reach its destination until January 15, and this action was instituted to recover damages which it is alleged resulted from unreasonable delays due to the railway company's negligence. From the judgment in favor of plaintiff and from an order denying it a new trial, the defendant appealed.

The complaint counts upon the carrier's common-law liability. [1] The answer sets forth a special contract under which, it is alleged, the shipment was made, and the execution of this contract is admitted by the reply. Appellant insists that the plaintiff was bound by the special contract; that he cannot sue for a breach of the carrier's common-law duty; and that, by pleading a tort and proving a breach of the contract, a fatal variance resulted. The precise question was presented fully, considered at great length, and determined adversely to appellant, in *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642. A review of that decision confirms us in its correctness, and further discussion would be of no avail.

Paragraph 6 of the contract pleaded provides: "(6) The said [2-4] shipper further agrees that as a condition precedent to his right to recover any damages for loss or injury to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock." In a few instances, provisions similar to this

have been held to be in the nature of statutes of limitations; but the decided weight of authority holds, and the better reason is, that their effect is simply to limit the carrier's common-law liability. That a common carrier may by special contract limit the liability which it would otherwise incur, provided the terms of the special agreement are reasonable, was recognized in the *Nelson Case* and is the generally accepted doctrine in this country. (4 Rul. Case Law, secs. 230, 253.) Whether such special contract is or is not valid depends upon its reasonableness; and this question is always referable for solution to the facts and circumstances of the particular case. (*Queen of the Pacific*, 180 U. S. 49, 45 L. Ed. 419, 21 Sup. Ct. Rep. 278.)

At the time the contract in question was executed at Belgrade, the shipper and agent for the carrier understood that the line of the Northern Pacific Company did not extend to Chicago, and that from the Minnesota transfer, near St. Paul, to Chicago, the stock would go forward over another line, the Chicago, Burlington & Quincy, which was designated in the contract as the connecting carrier. Notice of this claim was given on January 25, but in the answer it is alleged that such notice was not given until long after the cattle in question had been removed from the place of destination and mingled with other stock, and this is admitted by the reply. If the paragraph above means anything, it required the shipper to give notice in writing to an officer or station agent of the Northern Pacific Company. Notice to an agent of the Burlington Road would not have been effective for any purpose. The *company* mentioned in paragraph 6 is defined by the preamble to the contract to mean the "Northern Pacific Railway Company." Furthermore, if this provision is valid, it must be so construed as to serve some purpose. Its evident purpose was to enable the carrier to investigate the condition of the stock, and to that end the shipper was required to keep them separate until such investigation was made or a reasonable time therefor had elapsed. By the facts before us the reasonableness of the provision is to be tested. The contract is silent upon the question of service of the notice. If personal

service was necessary, the shipper was required to hold the cattle at the Union Stockyards until he could find an officer or station agent of the Northern Pacific Company. No particular officer or station agent is designated, and, if this provision is to be taken literally, the shipper was required at his peril to assume the burden of finding some person who answered the description given. There is not a suggestion in the contract, in the pleadings or the proof, that the Northern Pacific Company had an officer or station agent at Chicago, or nearer than St. Paul, the eastern terminus of its road—more than 400 miles away. If service could have been made by mail, plaintiff would have been in no better position, though doubtless a letter written to the station agent at Belgrade, and mailed postpaid at Chicago, would have sufficed for a literal compliance with the terms of this provision. But, in any event, plaintiff would have had to bear the burden of keeping his cattle on the cars or in the stockyards until the notice had been received and a reasonable time for inspection had elapsed. If the paragraph in question be construed to mean that a written notice mailed from Chicago to any station agent of the Northern Pacific Company, even the agent at Seattle, would suffice, it is senseless. If it is construed to mean that the shipper should travel from Chicago to St. Paul and make personal service of the notice upon an officer or station agent of the Northern Pacific Company, then it is unreasonable to the point of being unconscionable. Whether the company had an officer or station agent at Chicago—at a point where it has no road—upon whom service of this notice could have been made, was a matter peculiarly within its own knowledge, and for this reason the burden was upon it to make proof of such fact.

If the carrier was negligent, resulting in unreasonable delay in the shipment and consequent damage, plaintiff's cause of action for a breach of common-law duty was complete without reference to notice. To escape liability, the burden was upon the carrier to plead and prove such a special contract as would effect a modification of the duty imposed by the common law.

In the *Nelson Case*, Mr. Commissioner Poorman, voicing the opinion of the court, said: "The effect of the special contract is therefore merely to create and define certain cases and conditions under which its full common-law liability shall not attach. The special contract is the evidence of such exception, and, to the extent to which it is valid, constitutes a defense, and as such must therefore be pleaded as a defense; the burden of proof resting on the defendant to establish it."

The validity of paragraph 6 above depends upon its reasonableness, and it was therefore incumbent upon the carrier to show that it was relieved by the provision of a contract valid—in this instance reasonable. (*Houtz v. Union Pac. R. Co.*, 33 Utah, 175, 17 L. R. A. (n. s.) 628, and note, 93 Pac. 439.)

In *Missouri Pac. Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574, there was presented a case in all particulars identical with the one before us, and the court there said: "If a carrier sets up a claim to notice of a given fact, as a condition upon which its liability to a shipper is to depend, then it is incumbent upon it, when the notice was to be given to one of its own officers or agents, to show that it had an officer or agent at or near the place where the notice is to be given, in any case in which the shipper, by the terms of the contract through which notice is claimed, is to hold the property shipped at the place of delivery, at his own expense and risk, until it can be inspected by some agent of the carrier. This would be especially true when the property to be inspected is intended for immediate sale at the place of destination, is perishable in character, likely to deteriorate in value by holding, and expensive to keep. If in such case the carrier has not an officer or agent at or near the place where the property to be inspected is delivered, so that notice may be promptly given and an inspection, if desired, speedily made, then a contract requiring notice to be given to any officer or agent of the carrier is not reasonable in its character." To the same effect is *Baxter v. Louisville, N. A. & C. R. Co.*, 165 Ill. 78, 45 N. E. 1003.

Our conclusion is that this provision of the special contract, in the absence of any showing that it was reasonable, was not binding upon the shipper, and this disposes of all other related questions.

By instruction 4 the trial court imposed upon the plaintiff the burden of proving negligence on the part of the defendant which resulted in the damages claimed. By instruction 10 the jury were informed that proof of unusual delays alone was not sufficient to establish negligence. By instruction 23 the court declared that the law imposes upon the carrier the duty of exercising reasonable diligence in its business and to complete the journey within a reasonable time, "and, if he does not do so, and the stock is injured by the delay, the carrier will be liable." The court then told the jury that whether a given time was or was not reasonable was a question of fact to be determined by the jury from all the circumstances of the case as presented by the evidence. There is not any conflict in these instructions. They are to be construed together. No. 4 fixes the burden of proof. No. 10 warns the jury as to the *quantum* of proof required, and No. 23 does nothing more than refer the question of reasonableness, under the circumstances of the given case, to the jury for determination upon the evidence before them.

There is not any conflict between instruction 4, which fixes the burden of proof, and No. 24, which directs the jury how that burden may be met. Neither are we able to agree with counsel for appellant that Instruction No. 24 is inherently erroneous. An instruction in all essentials identical with it was approved by the court in the *Nelson Case*.

Appellant contends most earnestly that plaintiff failed to [5, 6] show that the delays in the course of transportation were chargeable to the carrier's negligence. No useful purpose would be served by reviewing the evidence at length; we content ourselves with saying that we think the evidence in its entirety sufficient to sustain the verdict. If counsel for appellant mean that plaintiff did not show the cause of every delay and thereby

demonstrate that the delays resulted from negligence, then we agree with them; but we do not assent to the doctrine that plaintiff assumed any such burden. The movements of the train were under the exclusive management and control of the carrier, and the facts which caused the train to be delayed were peculiarly within the knowledge of the officers and agents of the railway company. As was pertinently remarked by the supreme court of Washington in *Jolliffe v. Northern Pac. Ry. Co.*, 52 Wash. 433, 100 Pac. 977: "A car may be sidetracked and delayed for one hour, or for twenty-four hours, by order of the train-dispatcher, or somebody in authority hundreds of miles away, for a necessity which is apparent to him; and that necessity may have been brought about by negligence in the intricate management of the business by some responsible agent of the company a long distance from the location of the train which is sidetracked. There certainly can be no semblance of justice in relieving the party from making a disclosure who is in a position to make it, or in making an explanation which will excuse it if there be such an explanation available to him. This court and other courts have frequently said that, where it is necessary to make a character of proof, which by reason of the circumstances surrounding the case is exclusively within the knowledge of one or the other of the parties, the burden would be upon the party possessed of that knowledge to make the proof." (See, also, note to *Cleve v. Chicago, B. & Q. Ry. Co.*, 15 Ann. Cas. 33.)

To impose upon the shipper the burden of ascertaining the cause of every delay in the transportation of his property and refuse relief in the absence of such proof would be tantamount to denying any right of action for damages resulting from negligent delays in transportation. Whatever may be said of the trial court's Instruction No. 10, when the plaintiff showed that the carrier consumed substantially thirteen days in delivering his stock in Chicago, over a route which usually consumes only six or seven days, he met the burden imposed upon him to make out a *prima facie* case, and called upon the defendant for ex-

planation, as the party possessing knowledge of the facts which occasioned the delays.

In *Nelson v. Chicago, B. & Q. Ry. Co.*, 78 Neb. 57, 110 N. W. 741, the court said: "While we do not hold that a railroad company is an insurer of the arrival of its trains on schedule time in the transportation of livestock or other freight, yet, where there is a material delay, the company must to exonerate itself from liability, show that the delay arose from some cause other than its own negligence."

In *Bosley v. Baltimore & O. R. Co.*, 54 W. Va. 563, 66 L. R. A. 871, 46 S. E. 613, the court quoted with approval from 5 American and English Encyclopedia of Law, second edition, 254, as follows: "It seems, however, that on proof of a delay in delivery a *prima facie* case is made out against the carrier, and the burden of proof rests upon it to show that it was not responsible. It rests on the carrier for the additional reason that such facts are peculiarly within the knowledge of the carrier and not easily ascertained by the shipper."

In *Johnson v. New York, N. H. & H. R. R. Co.*, 111 Me. 263, 88 Atl. 988, the court said: "If there were no other facts than those already stated, we think a jury would be warranted in saying that there was unreasonable delay somewhere in forwarding and transporting this car of strawberries; the time occupied being fifty-three hours instead of twenty-four hours or less, the ordinary time. It is so far sufficient that it puts the *onus* of explanation on the defendant."

In 4 Elliott on Railroads, second edition, section 1583, the rule is stated as follows: "The fact that there was unusual delay does not always show a breach of duty. * * * The delay may be so great as to make it proper for the court to adjudge, as matter of law, that it was unreasonable; but, in accordance with the doctrine heretofore stated, the delay may be shown to have been a reasonable one under the facts and circumstances of the particular case, and, as a general rule, the question is one of fact, or of mixed law and fact, for the jury, under proper instructions. Where the delay is an unusual one, and is not

explained, it is held to be *prima facie* evidence of negligence, but that, in a case where there is only a slight delay, the rule is different." (*Tiller & Smith v. Chicago, B. & Q. Ry. Co.* (Iowa), 112 N. W. 631; 6 Cyc. 506.)

In justice to appellant's contention, it must be conceded that the authorities are by no means unanimous in supporting the rule as we have announced it, as a reference to 4 Rul. Case Law, sec. 464, and other texts, will demonstrate; but, without reference to the weight of authority numerically considered, we have adopted the rule which in our judgment is most reasonable and imposes the least hardship.

It is insisted by counsel for appellant that, even if it be held that plaintiff made out a *prima facie* case, it was completely overcome by the testimony of defendant in explanation of the delays. To give even a brief epitome of the testimony of defendant's twenty-three witnesses would extend this opinion needlessly. In our judgment, instead of fully exonerating the carrier, the evidence produced by it materially aided plaintiff's case.

We do not find any error in the record prejudicial to a substantial right of appellant, and direct that the judgment and order be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied January 6, 1915.

Appeal taken to supreme court of the United States, January 29, 1915.

STATE EX REL. SMITH, RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,595.)

(Submitted December 14, 1914. Decided December 18, 1914.)

[145 Pac. 721.]

Elections—Members of Legislature—Contests—How Determined—Constitution—Departments of Government—Initiative and Referendum—Statutes.

Effect of Statute Initiated by Electors.

1. An Act initiated by the people has no greater efficacy than one enacted by the legislature, in so far as its constitutionality is concerned.

Constitution—Nature of Instrument.

2. Speaking generally, the state Constitution is a limitation, not a grant of powers.

[As to self-executing provisions of the Constitution, see note in Ann. Cas. 1914C, 1116.]

Same—Legislature—Election Contests—How Determined.

3. The provision of section 9, Article V of the state Constitution that each house of the legislative assembly shall judge of the elections, qualifications, etc., of its members, is a power granted by the people which cannot be delegated by either or both acting together. Neither house can divest itself of the power conferred upon it, and no person, officer or court can infringe upon the exclusive privilege granted.

Same—Judicial Department—Infringement by Legislature.

4. *Held*, that since the requirement of section 49 of the Corrupt Practices Act (Laws 1913, p. 613), making it incumbent upon the district court in the case of a contest of the election of a state senator or representative, to hear the evidence and make findings to be transmitted to the secretary of state and by him delivered to the presiding officer of the senate or house, constitutes the judge of such court a mere agent of the legislature for the purpose of gathering evidence and making findings which have no binding force—a duty which, being nonjudicial in character, cannot be imposed upon judges—such provision is invalid.

Pleadings—When not Amendable.

5. A pleading which in legal effect is a nullity is incapable of amendment.

Election Contests—Statement—Untimely Filing—Effect.

6. A statement of contest, involving the office of state senator, not filed within twenty days after a certificate of election had been issued to the contestee (Rev. Codes, sec. 83), was ineffective for any purpose, and the clerk of the district court was therefore not required to issue a commission to two justices of the county to take the depositions of the witnesses who might be called by the parties.

Same—Members of Legislature—Statutes.

7. While failure on the part of a contestant to file his statement of contest within the twenty-day period precludes him from having depositions taken as provided in sections 84 to 87, Revised Codes, it does not deprive him of the right to have the contest heard under the power conferred upon both houses of the legislature by section 9 of Article V of the Constitution.

Original application by the State on the relation of Charles W. Smith, for writ of *certiorari*, to review an order of the District Court of the Fourteenth Judicial District in and for the County of Broadwater and John A. Matthews, Judge thereof; refusing a writ of mandate. Dismissed.

Mr. Gael G. Wilson, for Relator.

Mr. O. W. McConnell and *Mr. R. Lee Word*, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At the general election held on November 3, 1914, Charles W. Smith was the Republican candidate, and Charles S. Muffly was the Democratic candidate, for state senator for Broadwater county. The canvassing board returned that Muffly received the highest number of votes, and a certificate of election was issued to him on November 6. On November 25 Smith commenced an action in the district court of Broadwater county contesting Muffly's election. On December 3 the contestant secured leave of the court to amend his petition or complaint by striking therefrom:

"In the District Court of the Fourteenth Judicial District of the State of Montana, in and for the County of Broadwater.

"Charles W. Smith,

Contestant,

v.

Charles S. Muffly,

Contestee.

"PETITION.

"To the Honorable John A. Matthews, Judge of the District Court of the Fourteenth Judicial District of the State of Montana in and for the County of Broadwater:

"The petition of contestant, above named, alleges."

—and substitute therefor the following:

"In the Matter of the Contest of Election of Charles S. Muffy to the Office of Senator for the County of Broadwater, State of Montana.

"Charles W. Smith,
Contestant,

v.

Charles S. Muffy,
Contestee.

"STATEMENT OF CONTEST.

"Charles W. Smith, contestant, presents and files this his statement of contest and alleges"—and by striking out the prayer that the court determine that Muffy was not elected and that contestant was, that a citation issue to Muffy requiring him to appear and answer, and that the ballots used at the election in precincts 1 to 13 be produced in court and counted, and that a certificate of election be ordered to issue to contestant, and to substitute therefor:

"Wherefore contestant prays that the clerk of the district court of the fourteenth judicial district of the state of Montana, in and for the county of Broadwater, issue a commission directed to two justices of the peace of said county to meet at a time and place specified in such commission, in accordance with law, for the purpose of taking the depositions of such witnesses as the above-named parties to the above-entitled contest may wish to examine, and that such other proceedings may be had for the determination of said contest as are authorized by law and by the statutes of the state of Montana." On the same day a paper designated "Statement of Contest" was filed with the clerk of the court, and application made for a commission to two justices of the peace to take testimony. The clerk having refused to issue the commission, proceedings in *mandamus* were instituted in the district court to compel the performance of that duty. The court refused to issue the writ, and this proceeding in *certiorari* was instituted to review the court's action. Upon the return, counsel for the respondent interposed a demurrer and

a motion to quash, and the matter is before us for determination upon the complete record of all prior proceedings. Technically, all of these proceedings were not before the district court, and it is urged are not now before us. But nothing is before us which we would not have required upon a hearing upon the merits, and nothing has been excluded which could have come before us properly. We shall therefore disregard the technical objection made, and consider the record as a whole.

Sections 48, 49, 52 and 53 of an Act approved at the general election in 1912 (Laws 1913, pp. 612, 613), under the initiative power reserved to the people by our state Constitution, and familiarly known as the Corrupt Practices Act, provide for contesting nominations or elections by actions in the district courts. Section 49, among other things, declares: "In the case of a contested nomination or election for senator or representative in the legislative assembly, * * * the court shall forthwith certify its findings to the secretary of state to be by him transmitted to the presiding officer of the body in question." Article VI, Part III, Title I, Revised Codes (secs. 82-92), provides methods for securing and perpetuating testimony in a contest of an election of a member of either house of the legislative assembly. The first method requires, as a condition precedent, that within twenty days after the certificate of election has been issued a statement of contest shall be filed with the clerk of the district court of the county where the contest arises, whereupon the clerk must issue a commission to two justices of the peace of his county, who shall take the depositions of the witnesses produced by either the contestant or contestee, report the same to the clerk, who shall forward the evidence to the secretary of state, by him to be transmitted to the presiding officer of that branch of the legislature before which the contest is to be tried. The second method (section 91) provides for depositions to be taken in the manner and under the rules applicable in civil cases; and section 92 provides: "The house before which the contest is pending may take such other evidence in the case as it deems material."

While the Corrupt Practices Act is in force by virtue of a vote of the people, it has no greater efficacy as a statute than [1] if it had been enacted by the legislature; in other words, it cannot affect any provision of the Constitution. If by this Act it was sought to confer upon a district court power to decide which of two legislative candidates has been elected, it is to that extent, and for that reason, invalid. Section 9, Article V, of our state Constitution provides: "Each house (of the legislative assembly) shall * * * judge of the elections, returns, and qualifications of its members." A like provision is found in the Constitution of the United States and in the Constitution of every state in the Union, so far as we know. Speaking generally, [2, 3] our state Constitution is a limitation of powers, but the provision in section 9 above is an exception to that rule. This is a distinct grant of power by the people to each branch of the legislative assembly, a power necessary to the existence and independence of each house as an instrumentality of government. This power, emanating from the sovereign people, cannot be delegated by either house or both acting together; and likewise neither house possesses the power to divest itself of the authority thus conferred upon it. (*O'Neill v. Yellowstone Irr. Dist.*, 44 Mont. 492, 121 Pac. 283; *State v. Holland*, 37 Mont. 393, 96 Pac. 719.) So long as our Constitution stands as it is now written, no officer, individual, court or other tribunal can infringe upon the exclusive prerogative of each house to determine for itself whether one who presents himself for membership is entitled to a seat.

In considering a like provision of the Constitution of Kansas, Mr. Justice Brewer said, "The Constitution declares (Art. II, sec. 8) that: 'Each house shall be judge of the elections, returns, and qualifications of its own members.' This is a grant of power, and constitutes each house the ultimate tribunal as to the qualifications of its own members. The two houses acting conjointly do not decide. Each house acts for itself, and by itself, and from its decision there is no appeal, not even to the two houses. And this power is not exhausted when once it has been

exercised, and a member admitted to his seat. It is a continuous power, and runs through the entire term. At any time, and at all times during the term of office, each house is empowered to pass upon the present qualifications of its own members. By section 5 of the same article acceptance of a federal office vacates a member's seat. He ceases to be qualified, and of this the house is the judge. If it ousts a member on the claim that he has accepted a federal office, no court or other tribunal can reinstate him. If it refuses to oust a member, his seat is beyond judicial challenge. This grant of power is, in its very nature (and so as to any other disqualification) exclusive, and it is necessary to preserve the entire independence of the two houses. Being a power exclusively vested in it, it cannot be granted away or transferred to any other tribunal or officer." (*State ex rel. v. John S. Gilmore*, 20 Kan. 551, 27 Am. Rep. 189.)

But section 49 of the Corrupt Practices Act probably does not [4] attempt to confer upon the court power to determine the relative rights of legislative contestants to office. It requires only that the court make findings which are to be transmitted to the secretary of state, to be by him delivered to the house which tries the contest. If the findings made by the court pursuant to this section could, under any possible set of circumstances, become binding, the power thus attempted to be conferred upon the court would be in its nature judicial, and no valid objection could be urged against the legislation. But the constitutional injunction to each house to determine the elections, returns and qualifications of its own members—which is mandatory and prohibitory in its character—precludes the possibility that the court's findings can ever have any binding force or effect. The function performed by the court is nothing more than that of an agent of the legislature—just such a function as might be performed by a referee or notary public. Under our Constitution the powers of government are distributed among the legislative, executive, and judicial departments, which are declared to be distinct and are co-ordinate, and "no person or collection of persons charged with the exercise of powers prop-

erly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this Constitution expressly directed or permitted." (Art. IV, sec. 1.)

In *State ex rel. Schneider v. Cunningham*, 39 Mont. 165, 101 Pac. 962, we said with reference to this provision: "Its purpose is to constitute each department an exclusive trustee of the power vested in it, accountable to the people alone for its faithful exercise, so that each may act as a check upon the other, and thus may be prevented the tyranny and oppression which would be the inevitable result of a lodgment of all power in the hands of one body. It is incumbent upon each department to assert and exercise all its power whenever public necessity requires it to do so; otherwise it is recreant to the trust reposed in it by the people. It is equally incumbent upon it to refrain from asserting a power that does not belong to it, for this is equally a violation of the people's confidence. Indeed, the distinction goes so far as to require each department to refrain from in any way impeding the exercise of the proper functions belonging to either of the other departments."

The jurisdiction of the district court is defined and limited by section 11, Article VIII, of the Constitution. Every power therein enumerated is judicial in character; and that the law-making branch of government cannot compel a court to act as its agent, or the agent of either house of the legislature, merely to gather evidence and make findings therefrom which have no binding force or effect, or for any other purpose, follows from the very character of the judiciary as an independent, co-ordinate branch of government. The provision of section 49 of the Corrupt Practices Act above quoted is invalid for this reason, and the contest proceeding instituted in the district court of Broadwater county on November 25 was a nullity, and the [5] complaint or petition was of no more effect than a piece of blank paper, and therefore was not the subject of amendment.

It is idle to suggest that contestant intended his original petition, filed in court on November 25, to constitute a statement

of contest under the Code provisions above. It was filed in court, entitled in court, and appealed to the court for relief.

[6] The paper filed on December 3 meets the requirements of section 83, Revised Codes, but it was not filed within twenty days after the certificate of election had been issued to the contestee, and for that reason was not effective for any purpose (15 Cyc. 400), and did not call for any action on the part of the clerk.

It may be observed in passing that the method of instituting a contest provided by sections 82 *et seq.*, above, is not exclusive. Those provisions merely contemplate a convenient method of [7] securing speedily the testimony of witnesses who might, by leaving the state, avoid service of process. The power conferred by section 9, Article V, of the Constitution, above, is a continuing one, and may be exercised at any time during the term of the member. The rights of a contestant are not abridged in any respect, then, by his failure to commence his proceedings within the twenty-day period designated in section 83, above. Such failure operates only to preclude him from having depositions taken in the manner and at the time provided in section 84 to 87, but leaves him every other facility for a hearing.

Because the proceeding instituted on November 25 was ineffectual, and the proceeding commenced on December 3 was too late, this relator is not entitled to any relief in this court. The demurrer and motion to quash are sustained, and the proceeding is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

**IN RE WILLIAMS' ESTATE. HARLEY ET AL., RESPONDENTS,
v. WILLIAMS, APPELLANT.**

(No. 3,435.)

(Submitted November 12, 1914. Decided January 13, 1915.)

[145 Pac. 957.]

Probate Proceedings—Wills—Contests—Publication by Testator—Evidence—Insufficiency—Attesting Witnesses—Interest—Burden of Proof—Trial—Reopening Case—Discretion—New Trial.

New Trial—Hearing of Motion—Authority of Substituted Judge.

1. Like the judge who heard the cause, a district judge called in to pass upon a motion for a new trial therein may, in the exercise of a sound discretion and judging from the printed record before him, disregard any testimony which he deems unsatisfactory or improperly received.

Wills—Contests—Witnesses—Interest.

2. While the fees to accrue to an executor (a witness to the execution of a will, though not a subscribing one) may be said to constitute an interest to be considered in weighing his testimony in a will contest, in contemplation of law they are no more than compensation for services, and cannot be denominated a "legacy," or a "devise," or a "beneficial gift," within the meaning of section 4732, Revised Codes, so as to disqualify him for interest.

[As to attestation and witnessing of wills, see notes in 10 Am. Dec. 516; 114 Am. St. Rep. 209.]

Same—Subscribing Witnesses—Testimony not Conclusive.

3. The testimony of the attesting witnesses to a will is open to contradiction.

Same—Subscribing Witnesses—Admissibility of Evidence.

4. Where the attesting witnesses to a will are present in the county, they must, under Rev. Codes, sec. 7400, in a contest, be called and examined, and other testimony to prove the will cannot be received to the exclusion of theirs. Where, however, one is absent and his deposition is introduced, evidence of one not an attesting witness may properly be received to supplement the testimony of the subscribing witness who is present at the hearing.

Same—Publication by Testator—What Sufficient and What Insufficient.

5. Under section 4726, Revised Codes, the attesting witnesses to a will must, at the time they attest, be informed in some way (though not necessarily in words) by the testator himself that the instrument he has subscribed is his will; knowledge of his fact derived from any other source or at any other time being insufficient.

Same—Publication—Insufficiency of Evidence.

6. Evidence in a will contest held to show that the requirement of section 4726, Revised Codes, relative to publication of her will to the subscribing witnesses by the testatrix was not observed.

Same.

7. Where both subscribing witnesses to a will testified that testatrix did not publish to them the fact that the instrument was her will, the

subsequent impeachment of only one of them, was ineffectual to establish the will.

Same.

8. Where neither of the subscribing witnesses read the attesting clause, and both agreed that when the paper was handed to them for signature, it was so folded that they did not see that portion of it which stated that it was signed, published and declared by testatrix, *etc.*, the contention that the recitals of the clause showed that the requirements of the law had been met was unavailing.

Same—Evidence—Inadmissibility.

9. Evidence of a conversation between the two subscribing witnesses to a will mentioned above, in which one was said to have told the other that testatrix had stated to him at the time they signed it that the instrument was her will, was inadmissible in proponents' case in chief, as well as in rebuttal where no foundation had been laid.

Trial—Reopening Case—Discretion.

10. The refusal of an offer of proof made, upon a motion to reopen the hearing, after the cause had been taken under advisement, was a matter addressed to the discretion of the trial court.

Wills—Probate—Contest—Burden of Proof.

11. Upon the trial of the issues tendered by the contestant of a will on probate thereof and joined by the answer of the proponent, the burden of proof rests upon the former. ,

[As to burden of proof in will contests after probate, see note in Ann. Cas. 1914C, 535.]

Same—Subscribing Witnesses—Interest—Evidence—Admissibility.

12. A letter written by one of the subscribing witnesses after his deposition, which was introduced at the trial, had been taken, detailing his testimony, in which he emphasized portions by underlining, was properly admitted as showing a state of mind properly to be considered in weighing his testimony.

Appeal from District Court, Silver Bow County, Second Judicial District; R. Lee McCullough, a Judge of the Fourth Judicial District, presiding.

PROCEEDING by Andrew J. Davis and another for the probate of the will of Rachel E. Williams, deceased, contested by Dorothy Alice Williams, by her guardian, Sibyl Scott. From a judgment admitting the instrument to probate, and from an order denying a new trial, contestant appeals. Reversed and remanded.

Mr. J. E. Healy, for Appellant, submitted a brief and argued the cause orally.

We submit that Harley, under the conditions presented here, was not competent as a witness under the provisions of section 4732, Revised Codes. The words "devise" and "legacy" are used therein in the common law and statutory sense; the added

words, "beneficial gifts whatever," must include the fees of an executor, or else there is no application for such words. Gifts *inter vivos* or *mortis causa* would not be included in a will. (*In re Ross' Estate*, 140 Cal. 282, 73 Pac. 976; *Conlin v. Board of Supervisors*, 99 Cal. 17, 37 Am. St. Rep. 17, 21 L. R. A. 474, 33 Pac. 753; *Bourn v. Hart*, 93 Cal. 321, 27 Am. St. Rep. 203, 15 L. R. A. 431, 28 Pac. 951.) Harley was incompetent at the common law. (*Fisher v. Spence*, 150 Ill. 253, 41 Am. St. Rep. 360, 37 N. E. 314; 40 Cyc. 1114.) Even without a contest, the burden of proof to show the proper execution of the will was upon the proponents. (*In re Hayden's Estate*, 149 Cal. 680, 87 Pac. 275.) The subscribing witnesses are the ones the law regards most highly; they are not formal witnesses merely; they are a substantial portion of the law regarding wills, and their testimony is highly regarded. (*Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657; *Swanzy v. Kolb*, 94 Miss. 10, 136 Am. St. Rep. 568, 18 Ann. Cas. 1089, 46 South. 549; Schouler on Wills, sec. 348; Rev. Codes, sec. 7400.) With the exception that Harley does not renounce his executorship, this case is parallel with *In re Hitchler's Will*, 25 Misc. Rep. 365, 55 N. Y. Supp. 642, *Trustees v. Calhoun*, 38 Barb. (N. Y.) 148, and *Gilbert v. Knox*, 52 N. Y. 125.

The burden of proving the due execution of the will was upon the proponents at all times, and there is nothing in the cases which relieves the proponents of such burden. There is nothing to the contrary in *Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1004. (See *In re Hitchler's Will*, *supra*; *Latour's Estate*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; *Delafield v. Parish*, 25 N. Y. 9.)

Especially is the above true of the execution of an unnatural or unjust will as here shown in the evidence. (Schouler on Wills, sec. 77; *Meier v. Buchter*, 197 Mo. 68, 7 Ann. Cas. 887, 6 L. R. A. (n. s.) 202, 94 S. W. 883.)

The acts of the testator must be consummated before they can be attested. (*Reed v. Watson*, 27 Ind. 443.) If on examining all the witnesses and considering the attending circum-

stances a reasonable doubt remains whether one or more of the directions of the statutes have not been omitted, the probate must be refused, although the probability is that the paper expresses the testator's intentions. (*Tarrant v. Ware*, 25 N. Y. 425, note; *Chaffee v. Baptist Missionary Convention*, 10 Paige (N. Y.), 85, 40 Am. Dec. 225.) The attestation of the witnesses should follow in point of time the signing by the testator, or his acknowledgment and the publication of the will, where that formality is required. (Beach on Wills (pony series), sec. 43.) As was said in *Duffie v. Corridon*, cited in *Brooks v. Woodson*, 87 Ga. 379, 14 L. R. A. 160, 13 S. E. 712: "To witness a future event is equally impossible, whether it occur the next moment or the next week." (See, also, *Lane v. Lane*, 125 Ga. 386, 114 Am. St. Rep. 207, 5 Ann. Cas. 462, 54 S. E. 90.)

In the states where publication is expressly required the courts have held that any method whereby the testator communicates to the witnesses that the instrument is his last will and testament is a sufficient publication. (*Buzby v. Darnell*, 52 N. J. Eq. 337, 31 Atl. 382; *Elkington v. Brick*, 44 N. J. Eq. 154, 1 L. R. A. 161, 15 Atl. 391; *Lane v. Lane*, *supra*; *In re Beckett*, 103 N. Y. 167, 8 N. E. 506; *In re Hunt*, 110 N. Y. 278, 18 N. E. 106.) And the signing and request to witness must be made so that the witnesses may identify the signature. (*In re Keeffe's Will*, 155 App. Div. 575, 141 N. Y. Supp. 5; *Mackay's Will*, 110 N. Y. 611, 6 Am. St. Rep. 409, 1 L. R. A. 491, 18 N. E. 433.) A statement in the attestation clause that the instrument is a will is not a good and sufficient publication of the will. (*Brinckerhoff v. Remsen*, 8 Paige (N. Y.), 487; *Bashin v. Bashin*, 36 N. Y. 416; *Abbey v. Christy*, 49 Barb. (N. Y.) 276.) "In order to satisfy the statute, the declaration before the attesting witnesses must be unequivocal, whether expressed by words or signs. It will not suffice that the witnesses have learned elsewhere, and from other sources, that the document is a will, or that they suspect such is the character of the paper. The fact must in some way, although no particular form of words is required, be declared by the testator in their presence, so that

they may know it from him." (*Lewis v. Lewis*, 11 N. Y. 220; Schouler on Wills, 3d ed., p. 336; note to *Cook v. Winchester*, 8 L. R. A. 822; *In re Turrell's Will*, 28 Misc. Rep. 106, 59 N. Y. Supp. 780; Page on Wills, secs. 226-228; 40 Cyc. 1117, 1118.)

Messrs. George F. Shelton, E. N. Harwood and Fred. J. Furman, for Respondents, submitted a brief; *Mr. Shelton* argued the cause orally.

In the case of *Cottrell's Will*, 95 N. Y. 329, the will was admitted to probate notwithstanding both witnesses who subscribed to the attestation clause thereof testified in the surrogate's court, as stated in the opinion, "that none of the formalities required by the statute were complied with in its execution in their presence." (See, also, *Trustees v. Calhoun*, 25 N. Y. 422; *Orser v. Orser*, 24 N. Y. 51; *Ames v. Ames*, 40 Or. 495, 67 Pac. 737 (cited with approval in *In re Miller's Estate*, 37 Mont. 545, 97 Pac. 935); *Grimm v. Tittman*, 113 Mo. 56, 20 S. W. 664.)

In Woerner's American Law of Administration, volume 1, section 40, it is said, speaking of the witnesses to the will: "In most of the states they must know also, that he signed the instrument as and for his last will; to which end it is enacted by statute in Arkansas, California, Georgia, New Jersey and New York that, in addition to the acknowledgment of his signature, the testator must publish or declare in the presence of the attesting witnesses that the instrument by him executed is intended as his will. In these and other states it is held that the attesting witnesses must subscribe their names *animo attestandi*, but that no affirmative declaration to that end is necessary; any indication by the testator to the witnesses of his knowledge that the instrument to be attested by them is meant for his last will, is sufficient."

The testimony of a person who subscribed as witness to a will, attempting afterward to contradict the attestation certificate to which he subscribed, should be regarded with suspicion. (*In re Klein's Estate*, 35 Mont. 185, 88 Pac. 798; 30 Am. & Eng.

Ency. of Law, 595; *Hogan v. Grosvenor*, 10 Met. (Mass.) 54, 43 Am. Dec. 414; *Tilden v. Tilden*, 13 Gray (Mass.), 110.) In a note to *Schierbaum v. Schemme*, 80 Am. St. Rep. 604, speaking of the publication of a will, it is said: "It may be made in any form of communication by the testator to the witnesses whereby he makes known that he intends the instrument to take effect as a will. (*Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235.)" In the case of *Will of Meurer*, 44 Wis. 392, 28 Am. Rep. 591, it is said: "No special request by the testator to the witnesses to sign the will as witnesses thereto is necessary. If they sign in his presence, and without objection on his part, he knowing the fact that they are signing as witnesses, it is sufficient. (*Huff v. Huff*, 41 Ga. 696; *Brown v. De Selding*, 4 Sand. (N. Y.) 10; *Peck v. Cary*, 38 Barb. (N. Y.) 77; *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235.)"

In *In re Clafin's Will* (1901), 73 Vt. 129, 87 Am. St. Rep. 693, 50 Atl. 815, it is said in the court's opinion: "In the case at bar the writing and signing of the will and the superintending of its execution constituted a sufficient publication thereof by the testator, and in attesting the will the witnesses attested its publication."

In the case of *Rogers v. Diamond*, 13 Ark. 474, and in *Remsen v. Brinckerhoff*, 26 Wend. (N. Y.) 325, 37 Am. Dec. 251 (both cited with approval in *In re Miller's Estate*, 37 Mont., at p. 561, 97 Pac. 935), it is held that where "there was at the end of the instrument an attestation clause, set forth in the customary form, that the testatrix 'acknowledged to each witness that she subscribed the same, and declared it to have been her last will and testament.' This, if the witnesses had been asked to read it by the testatrix, or in her hearing, would have been a silent but clear declaration" (*Remsen v. Brinckerhoff*, 26 Wend. (N. Y.) 325, 37 Am. Dec. 251, 258); and that such a circumstance in connection with the signing of the will by the testatrix in the presence of witnesses thereto is a sufficient declaration by the testatrix that the instrument is her will. (*Rogers v. Diamond*, 13 Ark. 474, 490.) To the same effect is the court's ruling in

In re Woolsey's Will (1896), 17 Misc. Rep. 547, 41 N. Y. Supp. 263.

Mr. Harley is named in the will as one of the executors, but he is not a subscribing witness. Nor is there any statute or other authority cited by appellant's counsel which supports his contention that Mr. Harley is incompetent to testify as a witness in this will contest. In *In re Miller's Estate*, 37 Mont. 545, 97 Pac. 935, the executrix of the will there in contest was permitted to testify as a witness concerning the execution of that will. It was also held in the case of *Slandley v. Moss*, 114 Ill. App. 612, that: "A witness to a will is not disqualified merely by reason of the fact that such will appoints him as executor thereof." We have not examined the last-mentioned case, but we suppose the court was there speaking of a subscribing witness. In *Davenport v. Davenport*, 116 La. 1009, 114 Am. St. Rep. 575, 41 South. 240, the court ruled to the same effect.

The burden of proving the due execution of the will was sustained in the case at bar by proponents at all times. But when sufficient evidence was introduced to establish the will, the burden of overthrowing it shifted, or should shift, to contestant. (*Farleigh v. Kelley*, 28 Mont. 421, 63 L. R. A. 319, 72 Pac. 756; *In re Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1004; *In re Latour's Estate*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441.)

MR. JUSTICE SANNER delivered the opinion of the court.

Rachel E. Williams died on March 3, 1907, leaving an estate worth approximately \$100,000, and only one near relative, a granddaughter, then aged seven years, the appellant in this court. An instrument in writing, purporting to be the last will and testament of Mrs. Williams, was offered by respondents for probate, by the terms of which the sum of \$500 is given to the appellant, \$1,000 to Mary Sullivan, a domestic, and all the balance of the estate to Andrew J. Davis, of Butte. Mr. Davis and Mr. Lyman M. Harley are named as executors. This instrument is not holographic, but, with the exception of the signatures and

the places of residence of the attesting witnesses, it is entirely written in the handwriting of a distinguished attorney of Butte, who was not present at its execution. It occupies the whole of one and part of a second page. On the first page is the body of the instrument, the signature of Mrs. Williams, and the following part of the attesting clause: "The foregoing writing was signed, published and declared by Rachel E. Williams." On the second page is the remainder of the attesting clause in due form, the signature of Frank C. Norbeck, with his place of residence, and the signature of Warren A. Estabrook, with his place of residence.

The right to have this instrument received and regarded as the last will and testament of Mrs. Williams is contested by the appellant on several grounds, the chief of which is that Mrs. Williams did not declare to the attesting witnesses that it was her will, and that they were not requested by her to attest it as such. Trial was to the court, Hon. J. B. Poindexter, judge presiding without a jury. Mr. Norbeck was not personally present or within the county, but his deposition, taken at the instance of appellant, was on file. So far as the question now involved is concerned, the respondents rested upon the attesting clause, the testimony of Mr. Estabrook, which was received without challenge, and the testimony of Mr. Harley, which was admitted over the vigorous contention of appellant that it was inadmissible because of his interest in the outcome and because both attesting witnesses were before the court. The deposition of Mr. Norbeck was then read into the record as part of appellant's contest, and it was agreed, to save repetition, that all the testimony given should be considered in the record for all purposes. Findings of fact and conclusions of law were filed in favor of the will, and a decree was entered admitting the same to probate. Notice of intention to move for a new trial was served and filed; and, Judge Poindexter having been disqualified, this motion was heard by Hon. R. Lee McCulloch as judge presiding. The motion was denied; the order expressly stating, however, that "the testimony of Lyman M. Harley has been disregarded."

From this order, as well as from the judgment, the contestant has appealed.

It is advisable at the outset to determine the nature and effect [1] of the order appealed from. In this connection counsel for respondents say: "It will be presumed, we believe, that Judge McCulloch did not assume that it was his province to reject evidence properly introduced and received at the trial before Judge Poindexter. If it was Judge McCulloch's opinion that the findings made by Judge Poindexter, who tried the contest, were fully sustained by the evidence, without considering the testimony of Mr. Harley, his expression of such opinion was entirely proper and is fully sustained by the record. But the insertion of such opinion in the order overruling the motion for a new trial was not proper." The inference sought to be drawn is that the order is in effect a general one, to be considered by this court as having been made upon all the evidence, including the testimony of Mr. Harley, if that testimony be necessary to an affirmance. To this we cannot assent. The order denying a new trial expressly disregards the testimony of Mr. Harley and excludes it from consideration. The order is, in effect, a special one, and must be reviewed by this court as such, unless the rejection of Harley's testimony was itself improper. The assumption that, because Judge McCulloch did not preside at the trial, he was powerless to reject the testimony of Mr. Harley is wholly unwarranted. It is quite true that, when a motion for new trial for insufficiency of the evidence is decided by a judge who did not preside at the trial, "he ought not to go further than to determine upon the dead record whether there is a decided preponderance of evidence against the verdict or decision," and the presumptions commonly invoked to sustain the trial judge in like circumstances do not apply (*Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76); but this does not mean that the reviewing judge is deprived of all judicial faculty in considering the record before him; he must still "determine upon the dead record" where the preponderance of evidence rests; he must still estimate, as best he can, the weight and sufficiency of the evi-

dence as a whole and the value of its component parts, for his legal powers and duties in determining the motion are the same as those of the trial judge. That the trial judge, in passing upon a motion for new trial, can, in the exercise of a sound discretion, disregard any testimony which he deems unworthy is not open to doubt, and we can see no reason why a reviewing judge should not similarly determine whether any given evidence was improperly received or was so unsatisfactory in character that its want of value is patent on the printed page.

We do not hold, however, that Harley's testimony was improperly received, and do not assume that Judge McCulloch so held. The contentions of appellant are that Harley was disqualified for interest under section 4732, Revised Codes; and that his testimony was inadmissible, at least when received, under section 7400, Revised Codes. Neither position is sound. Section 4732 has no application, for the reason that Harley was not a subscribing witness, was not put forward as one, and was [2] not treated as such. While the fees to accrue to the executor might well be called an interest, to be considered in weighing his testimony, they are, in the eye of the law, but compensation for services, and can in no sense be denominated a "legacy," or a "devise," or a "beneficial gift," within the meaning of section 4732. Section 7400 is sought to be applied on the theory that both attesting witnesses were "present in the county," for which reason, it is asserted, other testimony to prove due execution could not be received at all, and certainly not until after they [3, 4] had been called and examined. Where the attesting witnesses are present in the county, they must be called and examined, and this means, of course, that under such circumstances other testimony to prove the will cannot be received to the exclusion of theirs; but their testimony, when given, is not necessarily conclusive upon either party. (*Farleigh v. Kelley*, 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319.) It was therefore the right of respondents to have the testimony of Harley at some stage of the proceeding and to have it on their preliminary proof, if they deemed it necessary to the establishment of a

prima facie case. Norbeck, however, was not present, and his deposition did not make him so; he could not be "called and examined." The fact that the deposition could be used for probative purposes only, upon the condition that he was absent, ought to settle the question of his presence; and, since he was not present, his deposition, taken at the instance of the appellant, furnished no legal obstacle to respondents' right to supplement the testimony of Estabrook by that of Harley.

We are required to conclude, then, that Harley's testimony was disregarded by Judge McCulloch because he placed no credence in it; and the question is, not whether this estimate is correct, but whether, upon the cold record, it must be branded as a clear abuse of discretion. We do not think so. Without entering at large upon a discussion of this testimony, we express the view that many reasons of record combine to at least authorize, if they did not compel, the action of the reviewing judge. This being so, his order must be taken as it stands—an adjudication of the question of execution upon the evidence of the attesting witnesses alone.

The substance of Mr. Estabrook's testimony is as follows: On January 21, 1907, he was asked by Mr. Harley to go that evening to the room of Mrs. Williams and witness a paper which he was given to understand was a will. He went to the room at the time appointed, entering with Mr. Norbeck and Mr. Harley. There Mrs. Williams was found sitting at a small table, upon which were pens and ink. She had in her hands the instrument in question. He and Mr. Norbeck took seats at the table. Mrs. Williams opened the paper, wrote upon the first page of it, folded the first page back, and passed the paper thus folded to Mr. Norbeck. She also proffered Mr. Norbeck the pen with which she had signed, but he declined it, preferring a fountain pen which he carried. Mr. Norbeck then placed upon the second page of the paper his name and place of residence and passed the paper to Mr. Estabrook. Mr. Estabrook asked Mr. Norbeck if he should sign in full, and Mr. Norbeck answered, "Yes," whereupon Mr. Estabrook put his name and place of

residence upon the second page. At the time of doing so he saw, and may have glanced at but did not read, the declaration under which he wrote. He knew from Mr. Harley's previous intimation that he was signing as a witness to a will, but there was nothing said by Mrs. Williams. So far as he heard—and his hearing was good—neither "will" nor "testament" was mentioned at any time by her or by anyone else in her presence, nor did she in any way request the witness to sign, other than by her passing the paper and pen. He thought, but would not swear, that there was some talk while he was signing. If there was, its purport did not reach him at the time. During this time Mr. Harley was present, but immediately afterward retired for a very few minutes at Mrs. Williams' request to procure some wine.

Mr. Norbeck deposed: "On January 21, 1907, Mr. Harley asked me to go to Mrs. Williams' room and witness a paper for her. I went in company with Mr. Harley and Mr. Estabrook. When we entered, she was sitting rather propped up in a large chair, with a small table at her side, on which were the papers. I went over to where she sat, and, to relieve the situation, remarked that she was looking very well, to which she replied, 'I have suffered so much you would be surprised how thin I am.' Mr. Estabrook and myself sat down at the table across from her on which were the papers. Mrs. Williams then asked Mr. Harley to go out and get us some wine, which he did. Mrs. Williams then wrote on one of the sheets of paper on the table and turned that sheet over, which exposed a second sheet, on which I signed. I did not see her signature, for the sheet she wrote on was turned back, covering the writing. I signed on the sheet which, as I remember, was fastened to the sheet she signed by a pin or fastener or otherwise. There was nothing said by Mrs. Williams or anyone else about the nature of the contents of the paper, and I therefore did not ask any questions or attempt to investigate. I just signed my name in a perfunctory sort of way. I then passed the paper over to Estabrook, after which he signed the same. There were no other persons

in the room when we signed, except Mrs. Williams, Estabrook, and myself. Mr. Harley did not come back with the wine until after Mrs. Williams had written on the paper and Estabrook and I had signed our names to it. When he arrived, we partook of a small glass of wine, and Estabrook and I left immediately thereafter." Mr. Norbeck further deposed: That nothing at all was said by Mrs. Williams while they were in the room, "except to order the wine and answer our comments about her health." "As I remember, Estabrook said nothing. My conversation was limited to remarks about her health. * * * She made no signs or motions, except to write on the paper. She did not give by words or signs, or at all, any statement or means of knowing the kind of paper that she had signed or we had signed." With regard to publishing and declaring or acknowledging the paper as her will and testament, "she did nothing and said nothing upon that subject." "I first learned and knew that I witnessed the paper purporting to be her will and testament at that time after her death. Mr. Will Scott of Helena came to Wallace, Idaho, where I was then living, and told me that I was a witness to her will. I did not see her after the 21st of January, 1907."

Taking this evidence at face value, the conclusion indicated is well established. Our statute (Civ. Code 1895, sec. 1723; Rev. Codes, sec. 4726) provides: "The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will." Compliance with this is essential. (*Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013; *In re Walker*, 110 Cal. 387, 52 Am. St. Rep. 104, 30 L. R. A. 460, 42 Pac. 815; *Estate of Seaman*, 146 Cal. 455, 106 Am. St. Rep. 53, 2 Ann. Cas. 726, 80 Pac. 700; *Gilbert v. Knox*, 52 N. Y. 125; *Brinckerhoof v. Remsen*, 8 Paige (N. Y.), 487; *Keeffe's Will*, 155 App. Div. 575, 141 N. Y. Supp. 5; *Bioren v. Nesler*, 77 N. J. Eq. 560, 78 Atl. 201; *Ludwig's Estate (Tobin v. Haack)*, 79 Minn. 101, 81 N. W. 758; *Richardson v. Orth*, 40 Or. 252, 66 Pac. 925, 69 Pac. 455; *Foley's Will*, 76 Misc. Rep. 168, 136 N. Y. Supp. 933; *Reed v. Watson*, 27 Ind. 443.) Such declaration, it is true, need not be in words. Where, for instance, the testator

is rational, the will is read to and signed by him in the presence of witnesses, and they, in his presence and with his intelligent acquiescence, are requested by another to attest the same and do so, the requirements of the statute have been sufficiently met. (*In re Miller's Estate*, 37 Mont. 545, 97 Pac. 935; *In re Beckett*, 103 N. Y. 167, 8 N. E. 506; *Elkinton v. Brick*, 44 N. J. Eq. 154, 15 Atl. 391, 1 L. R. A. 161.) It is imperative, however, that the witnesses, at the time they attest, be informed in some way by the testator himself that the instrument he has subscribed is his will. Knowledge of this fact, derived from any other source or at any other time, will not suffice. (*Gilbert v. Knox*, *supra*.) Why this is so was explained in *Noyes' Estate*, 40 Mont. 178, 105 Pac. 1013, from which we quote: "The right to make a testamentary disposition of property is not an inherent right; nor is it a right guaranteed by the fundamental law. Its exercise to any extent depends entirely upon the consent of the legislature, as expressed in the statute enacted on the subject. It can withhold or grant the right, and, if it grants it, it may make its exercise subject to such regulations and requirements as it pleases. It may declare the rules which must be observed, touching the execution and authentication of the instruments necessary to indicate the testator's intention and make a compliance with them mandatory. * * * The purpose of the formalities prescribed is to prevent simulated and fraudulent writings from being probated and used as genuine. While the application of the strict rule of construction may sometimes defeat the intention of the testator as manifested by an imperfectly executed and authenticated writing, yet in the long run such statutes tend to promote justice, by lessening, so far as possible, the opportunity for fraud, which history and experience have demonstrated to be feasible and measurably safe in the absence of them. * * * Since the right to make testamentary disposition is dependent upon the will of the legislature, it is no hardship upon anyone that the mode and formalities by which it may be effectively done are made mandatory by the same power. This rule of interpretation is recognized and applied

by the courts generally, both in England and in this country, whether the particular formality involved refers to the place of the signature of the testator, or the fact that he signed or made acknowledgment in the presence of the witnesses, or that he made publication, or that the witnesses have properly signed in his presence, and in the presence of each other and at his request. All of these formalities stand as of equal importance, and all must be observed."

The conclusion which would be commanded by the evidence of the attesting witnesses is challenged upon the grounds that one of them, Mr. Norbeck, has been successfully impeached, and [7, 8] that every requirement of the law is shown by the attesting clause as well as by the testimony of Mr. Harley to have been fully observed. The statute requires publication to both witnesses, and it surely cannot be supposed that such publication is established by showing that one of the witnesses is unworthy of belief. Assuming that Norbeck's testimony should be disregarded, notwithstanding its agreement in all essentials with that of Estabrook, the latter still stands unassailed, and its effect, if credited, is just as fatal to the respondents. (*Noyes' Estate*, *supra*; *Bryant's Estate*, 163 App. Div. 890, 148 N. Y. Supp. 917; *Abbey v. Christy*, 49 Barb. (N. Y.) 276.) In neither witness, however, is any motive to falsehood adequately shown; yet both assert that they did not read the attesting clause, and both agree that the paper, when passed to them, was folded over so that the part so important to this inquiry was hidden from their sight. It was physically possible for them to have turned the paper back, but such an act might well have seemed an impertinence to them. They were laymen; the paper was not theirs; they were not charged with the knowledge that the portion they saw and did not read, coupled with the portion they did not even see, constituted a complete attesting clause, or that the testatrix knew it to be such. Under such circumstances and against such testimony, the recitals are unavailing. (*Brinckerhoof v. Remsen*, *supra*; *Hitchler's Will*, 25 Misc. Rep. 365, 55 N. Y. Supp.

642; *Darnell v. Buzby*, 50 N. J. Eq. 725, 26 Atl. 676; *Woolley v. Woolley*, 95 N. Y. 231.)

Mr. Harley's testimony was in all respects singularly apt and complete. We need not pause to inquire under what circumstances the testimony of a person named as executor in an unnatural will ought to prevail over the evidence of both attesting witnesses, one of whom it was not even sought to impeach. Suffice it to say that since the attesting witnesses, whether they speak directly or through the attesting clause, are open to contradiction, it is possible to prefer other testimony to theirs, and cases can be imagined in which this ought to be done, especially where there is a complete attesting clause. Obviously, however, any testimony to prevail must be accepted. Mr. Harley's testimony was not accepted but expressly disregarded; and the case, so far as this court is concerned, stands as though he had never spoken. His was the only evidence of record upon which the due execution of this will could possibly be asserted, and to deny a new trial, after its rejection, was wrong.

A number of alleged errors of minor character are assigned on the part of both sides. Respondents complain, for instance, [9] of the refusal to admit a conversation between Norbeck and Estabrook after they had left the room of Mrs. Williams, to the effect that Mrs. Williams had told Norbeck that the instrument in question was her will, and also of the refusal to receive the record of Norbeck's conviction for embezzlement. These are in no sense compensatory. The legal effect of the evidence is simply to impeach Norbeck, and not to establish any fact in issue. But, even if the court believed that Norbeck had knowledge, that fact would not establish a publication by the testatrix to both witnesses, as required by law, and, in view of what has been said, could be of no particular value to the respondents upon the merits of this proceeding. In view of a retrial, however, we say that there was no error in refusing to receive the conversation between Norbeck and Estabrook upon respondent's original case, because it was not part of the *res gestae*, nor in refusing it in rebuttal as contradiction of Norbeck, because no

foundation had been laid. As to the conviction, the offer of proof was not made at the trial but upon a motion to open the [10] hearing after the court had taken the cause under advisement. It was entirely within the discretion of the court to refuse the offer at that time. (*Cole v. Helena L. & Ry. Co.*, 49 Mont. 443, 143 Pac. 974.)

The principal assignments of appellant have been disposed of by what is said above. The only ones of consequence remaining are those which complain because the burden of proof was put upon her, and the one relating to the admission of a letter from Norbeck to Estabrook. There was no error in either instance. [11] Where the burden of proof lies in the contest of a will is not open to question in this state. The proponents must, under their petition, make formal preliminary proof of the due execution of the will, sufficient, but for the contest, to authorize probate; that is the door to any further proceedings, whether there be a contest or not. But the contest is not tried upon issues tendered by the petition for probate and joined by the plea of contestant; it is tried upon issues tendered by the contestant and joined by the answer of the proponents. (Rev. Codes, sec. 7397.) Upon the trial of these issues the contestant is necessarily the plaintiff and has the burden of proof. (*Murphy's Estate*, 43 Mont. 353, Ann. Cas. 1912C, 380, 116 Pac. 1004; *Farleigh v. Kelley*, *supra*.) Of Norbeck's letter it may be said: It was written after his deposition had been taken, and it de- [12] tailed, with emphasis on some points by underscoring, the substance of his testimony. This neither contradicted Mr. Norbeck nor furnished any basis for imputing falsehood to him, but it tended to show a state of mind—partisanship or pride of opinion, perhaps—which, though not necessarily important, was proper to be considered in weighing his testimony.

The judgment and order appealed from are reversed, and the cause is remanded for retrial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

BARNARD REALTY CO., RESPONDENT, v. CITY OF BUTTE
ET AL., APPELLANTS.

(No. 3,446.)

(Submitted January 5, 1915. Decided January 15, 1915.)

[145 Pac. 946.]

*Constitution—Mines and Mining Claims—Taxation—Surface
Ground—Independent Value—Evidence—Insufficiency—Ille-
gal Assessment—Injunction.*

Mines and Mining Claims—Taxation—Constitution—Surface Ground.

1. Under section 2, Article XII of the Constitution, and section 2500, Revised Codes, before the land embraced in a mining claim becomes subject to taxation at a valuation greater than the price paid the government therefor, the taxing officers must ascertain, and they have the burden of showing when their authority is questioned, that the surface ground, or some portion thereof, is used for other than mining purposes and has an independent value for such purpose.

Same—Surface Ground—Independent Value—Evidence—Insufficiency.

2. Evidence that land embraced in a mining claim, by reason of its location within the limits of a city had an independent value for town-site purposes, without a showing that it was being used for such a purpose; that streets and sewers had been extended over it and other improvements made thereon for the accommodation of adjoining property holders, without the consent of the claim owner, however, who testified that it was his intention to work the property for the silver it was known to contain, was insufficient to warrant taxation of the land in excess of the limit prescribed in section 2, Article XII of the Constitution.

Illegal Taxation—Injunction—Proper Remedy.

3. Where the taxing authorities levy a tax not authorized by law, or upon property not subject to be taxed, their action is without jurisdiction and wholly void, and the remedy by injunction is available; in such a case it is not necessary that the owner first exhaust the remedy provided by amended section 2743, Revised Codes (Laws 1909, Chap. 135), by appearing before the county board of equalization and making timely objection to the assessment.

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

ACTION by the Barnard Realty Company against the City of Butte and Daniel Shovlin, City Treasurer. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Messrs. Alexander Mackel, Wm. F. Davis and N. A. Rotering, for Appellants, submitted a brief; Messrs. Mackel and Davis argued the cause orally.

Mr. E. B. Howell and *Mr. Edwin M. Lamb*, for Respondent, submitted a brief; *Mr. Lamb* argued the cause orally.

The county assessor did not follow the procedure outlined in section 2, Chapter 135, Laws of 1909. Instead of revising the assessment list furnished by the Barnard Realty Company, he left intact the assessment of the full Barnard placer, and made an entirely new assessment of a portion thereof to "A. W. Barnard." The notice provided by the statute calling attention to the change was not addressed to the Barnard Realty Company, which had furnished the list and was the owner of the property assessed, but was directed to "A. W. Barnard," who had not furnished the list and was not the owner of the property assessed. If the requirements of the statute were not followed, the action of the assessor was a nullity. "A legal assessment is the foundation of a legal tax. The assessor derives his authority from the statute, and in order to give him jurisdiction to act, or to clothe his official acts with any potency or efficacy, the provisions of the statute must be particularly followed." (*Northern Pac. R. R. Co. v. Carland*, 5 Mont. 146, 3 Pac. 134; *Clark v. Maher*, 34 Mont. 391, 87 Pac. 272.) "An assessment made as directed by law is an indispensable basis for the support of the tax that may be levied upon it." (*People v. Hastings*, 29 Cal. 450; 27 Am. & Eng. Ency. of Law, 660.)

The attempt of the assessor to assess the ground in controversy for other than mining purposes was wrongful. (*Murray v. Hinds*, 30 Mont. 466, 76 Pac. 1039.)

No use is shown, by the defendants, of this ground other than for mining purposes. A use by others for dumping ground would not be sufficient. A right of way for telephone lines or electric light lines or sewer to convenience the public would not be such a use by the plaintiff as is meant by the term, "so used for other than mining purposes," in the Constitution. In such a case as this, the burden is upon the appellant to show the lands sought to be taxed have an independent value by reason of profitable use for some other purpose, and that the city is entitled to impose the tax. (*Hale v. Jefferson County*, 39 Mont. 137, 101

Pac. 973.) This decision seems to squarely meet the facts in this case, for there the improvements upon the mining claim—the water ditch—could be used for irrigating agricultural land, and a revenue could be derived, yet until so applied, the court holds it is not the subject of taxation. So this property (which is mining property and taxed as such, and the taxes paid) could be, at least the surface, applied to other purposes, but, until such application is made, it is not subject to taxation other than for mining purposes under the Constitution and legislation thereunder. (Sec. 2500, Revised Codes.)

The appellants urge that the various rights of way, highways, sewers, *etc.*, should be considered as a use by the plaintiff of its property for other than mining purposes, but if these rights were not accorded voluntarily by the plaintiff, they could be secured by the public through the power of the law, eminent domain, and while there is evidence that some of this ground in controversy has been used as a dumping ground, it has not been used as such by the plaintiff.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to obtain a decree declaring null and void an assessment and tax levied in pursuance thereof by the authorities of the defendant city, upon property belonging to plaintiff and situated within the corporate limits of the city, and perpetually enjoining the defendant Daniel Shovlin, the city treasurer, from enforcing the collection of the tax by sale of the property. The trial court granted the relief demanded. The defendants have appealed from the decree and an order denying their motion for a new trial.

Patent to the Barnard placer mining claim was issued by the United States to Anthony W. Barnard and George McCausland on November 15, 1875. The claim covers an area of 34.75 acres, lying along Missoula gulch, which extends from north to south, immediately west of the city as originally surveyed and platted. For several years after the patent was issued the mine was

profitably worked for placer gold. When the deposits were so far exhausted as to render this character of mining unprofitable, Anthony W. Barnard, who in the meantime had become the sole owner, caused a portion of the claim to be subdivided into blocks and lots and to be made an addition to the city as the Barnard Addition. The lots in this addition have heretofore been sold, Barnard reserving the mineral rights. The addition covers the central portion of the claim, leaving portions of it to the north and south as reserves for mining purposes, or to be devoted to other uses. The plaintiff subsequently became the successor to all of Barnard's rights. Lands to the west owned by other persons were also subdivided and made additions to the city, with the result that at the present time the southern portion of the claim, an irregular area of several acres, is bounded on the north, east and west by lots occupied by buildings. A fair understanding of the situation may be gained by reference to the diagram found in *Barnard Realty Co. v. City of Butte*, 48 Mont. 102, 136 Pac. 1064, with the accompanying explanatory statement. The area designated "Barnard placer," extending from the alley on the north to and south of Silver street, is the property involved in this controversy. The entire area of the claim as originally patented was assessed by the county assessor for the year 1912 as placer mining property at \$2.50 per acre. Subsequently the assessor, at the instance of the city authorities, again assessed the area in controversy at a valuation of \$19,000, upon the theory that it had an independent value to this amount and for use as city lots. In the first assessment the plaintiff was named as the owner; in the second Anthony W. Barnard was named as the owner. Both assessments were extended by the county clerk upon the county assessment-roll and upon the duplicate delivered by him to the city treasurer as a basis for the levy of city taxes. The plaintiff paid the amount of the tax levied upon the first assessment, but refused to pay that levied upon the second, and, when the city treasurer proceeded to advertise and sell the property as delinquent, brought this action. Two questions have been submitted for decision, viz., whether the

second assessment and the tax levied in pursuance of it were authorized by law, and whether injunction is the proper remedy.

Section 2 of Article XII of the Constitution specifically declares all property, with certain exceptions, subject to taxation. The same provision permits the legislature in its discretion to exempt other property devoted to certain purposes. The following section (3) provides as follows: "All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be taxed at its value for such other purposes, as provided by law; and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law." Section 2500 of the Revised Codes is substantially an enactment of this provision in the form of statute.

The purpose had in view by the convention in formulating the provision of the Constitution was to bring into the class of taxable property mines and mining claims, and to provide a method by which the owners of them might be compelled to bear their equitable proportion of the expense of government. Therefore this species of property had generally been exempt. (*Northern Pac. Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386.) Recognizing the fact that such property is not generally susceptible of profitable use unless the deposits therein are extracted and put into commercial form, and in order to encourage the work of profitable development by protecting it against exactions which might prevent this result, it was deemed that the owner of a mining claim would fully acquit himself of his obligation

to the public by paying a tax: (1) Upon the acreage at the price paid to the United States; (2) upon the machinery used in mining and surface improvements, *etc.*, upon or appurtenant to the claim, which have a value independent thereof; and (3) upon the net proceeds of the product. So long as the claim is used and held exclusively for mining purposes, the owner of it is not required to bear any other burden; but when the property, having by its location acquired a value for some independent use, is devoted by the owner to such use, it becomes at once subject to taxation at that value as is other real estate, to be ascertained by the assessing officer just as he ascertains the value of other land for the purpose of taxation. By devoting it to the new use, the owner, so to speak, creates an estate which, in the eye of the law, is regarded as independent of the original estate and is subject to taxation as such. It will be noted, however, that two conditions must concur to justify the imposition of the additional burden; *viz.*, the surface ground, or some part thereof, must be used for other than mining purposes, and it must have an independent value for that purpose. When these conditions concur, but not otherwise, the owner must assume the additional burden.

While it is the rule that he who alleges that his property is exempt from taxation must sustain the burden of establishing the exemption, the provision in question not being an exemption provision, but really a revenue measure apportioning to the owners of mining claims what the convention deemed to be their just proportion of the public burden (*Northern Pac. Ry. Co. v. Mjelde, supra*), before the additional burden can be imposed, the taxing authorities must ascertain that the conditions authorizing its imposition in fact exist. In *Hale v. Jefferson County*, 39 Mont. 137, 101 Pac. 973, was involved the question whether a ditch appurtenant to a placer mining claim and used to convey water upon it to work it had a value independent of the claim, and was therefore subject to taxation upon the basis of such value. It was held that the burden was upon the taxing authorities to establish such value. The rule was recognized and ap-

plied in the earlier case of *Murray v. Hinds*, 30 Mont. 466, 76 Pac. 1039. The question at issue in that case was whether a tax levied upon a portion of the surface of a mining claim which had been subdivided into blocks and lots conforming to the streets and alleys of the city of Butte, and held for sale as opportunity offered, was valid. Upon the facts adduced showing this condition, this court held that it was. The court said: "Merely claiming a portion of the premises as reserved for mining purposes, and at the same time disclosing a state of facts absolutely inconsistent with the basis of their (plaintiffs') contention, places them in the position of having adopted a subterfuge to escape paying taxes on the property." The platting of the property for the purpose of putting the lots upon the market for sale and selling them as there was demand for them was sufficient to show an actual use and an independent value for that purpose. This conclusion was clearly correct; for such a use, at least so far as concerned the surface of the claim, was inconsistent with any possible intention on the part of the owner to use it thereafter for mining purposes. It was entirely competent for the owner of the claim to treat the surface right as a separate interest from that represented by the mineral reserved beneath, and sell it to others if he chose to do so. (*Northern Pac. Ry. Co. v. Mjelde, supra.*) The interest so held was property and subject to taxation upon the same footing exactly as if the title to the land had been acquired for agricultural purposes.

We shall not enter into a detailed examination of the evidence. [2] It is not disputed that the area of the Barnard placer in controversy has an independent value for town-site purposes. This attribute it has in common with every foot of land within the limits of the city of Butte, including many mining claims. This alone, however, is not sufficient to make it subject to the burden sought to be imposed upon it. As heretofore stated, before the burden can be lawfully imposed in any case, the surface must have been devoted to an independent use. The evidence does not disclose such a use of the area in dispute. While

it does furnish a basis for an inference that it may be the purpose of plaintiff at some future time to plat it into blocks and lots and put them upon the market, this has not been done, nor has it heretofore been occupied or used for any purpose. It is true that portions of the surface have been filled in by other parties with the consent of the plaintiff. Missoula Gulch has for many years been used as a dumping ground for waste dirt taken from excavations within the city. Other portions of the surface rendered uneven by excavations during the process of placer mining have been leveled off. It is also true that Silver street has been extended over the southern portion of it. Again it is true that a storm sewer has been extended through it by the city from north to south, and that other similar improvements have been installed for the accommodation of lot owners to the north and east. With the exception of Silver street, which was opened by plaintiff's consent, all these improvements have been installed without plaintiff's consent, or that of any of its officers. With reference to them it may be said that all of them might have been installed even against the consent of plaintiff, the city acquiring the right of way through the property by virtue of condemnation proceedings. On the other hand, it is not disputed that in this portion of the claim there are silver-bearing lodes which have been worked with some profit in past years, and which, Anthony W. Barnard testified, it is the intention to work in the future if silver reaches such a price in the market as to justify it. He stated further that, though in recent years the plaintiff had been frequently solicited to sell the property to persons who desired to plat it and put it upon the market, it had consistently refused to sell and held it as a reserve for mining purposes whenever circumstances would permit its use for this purpose. If such is the intention, as the trial court found, the tax sought to be imposed is wholly unauthorized and illegal. The most that can be said of the evidence touching the present or future intended use is that it does not decisively preponderate against the finding of the trial court, and hence must be accepted by this court as conclusive.

Contention is made that this action cannot be maintained, for the reasons that it is not alleged in the complaint nor shown by [3] the evidence that plaintiff appeared before the board of county commissioners while sitting as a board of equalization, and made objection to the assessment, and that the remedy provided by section 2743 of the Revised Codes, as amended by the Act of 1909 (Laws of 1909, c. 135), is exclusive. It is true that the complaint does not allege that the plaintiff appeared before the board and made timely objection to the assessment, nor is it disclosed by the evidence that it did so. It is sufficient to say in this connection however, that if the taxing authorities undertake to levy a tax not authorized by law, or upon property not subject to be taxed, their action is without jurisdiction and void. (*Clark v. Maher*, 34 Mont. 391, 87 Pac. 272.) It is not necessary to cite authorities to sustain the assertion that the right of the owner of property to relief by injunction is not in any wise affected by his failure, either upon notice by the assessor (amended section 2743, *supra*) or by the board itself (Rev. Codes, sec. 2581), to make timely objection. The assessment being wholly illegal, because without authority, its validity may be questioned by any available method. The same may be said as to the exclusive character of the remedy provided by amended section 2743, *supra*. It is true section 2745 declares that the remedy provided by the amended section *supra*, "shall supersede the remedy of injunction and all other remedies which might be invoked to prevent the collection of taxes or licenses alleged to be irregularly levied or demanded, except in unusual cases where the remedy hereby provided is deemed by the court to be inadequate." Notwithstanding this declaration, when the tax or the proceeding resulting in the levy of it is wholly illegal, as was pointed out in *Montana Ore Pur. Co. v. Maher*, 32 Mont. 480, 81 Pac. 13, the remedy by injunction is available. In this case it was said: "A consideration of sections 4023 (Rev. Codes, sec. 2741) and 4026 (Rev. Codes, sec. 2745) leads us to believe that the phrase 'irregularly levied or demanded' was used by the legislature advisedly, and as prescribing the limits wherein

the statutory remedy is exclusive, as distinguished from those cases of illegal taxes the collection of which may be restrained by injunction. In other words, if the action of the assessor or board of equalization was such that the tax complained of is manifestly void under any circumstances, injunction will lie to restrain its collection; but, if the error complained of is only an irregularity on the part of the assessor, the board of equalization, or the treasurer which may be subject to explanation so as to cure the apparent defect, or, in other words, where the tax complained of is not necessarily void under all circumstances, then the remedy provided by sections 4024 (Rev. Codes, sec. 2742) and 4025 (Rev. Codes, sec. 2744), namely, payment under protest and an action to recover back, is exclusive, except in those unusual cases mentioned in section 4026." (See, also, *Cobban v. Hinds*, 23 Mont. 338, 59 Pac. 1, and *Western Ranches, Ltd., v. Custer County*, 28 Mont. 278, 72 Pac. 659.)

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY and MR. JUSTICE SANNER concur.

JONES, RESPONDENT, v. ARMSTRONG, APPELLANT.

(No. 3,448.)

(Submitted January 6, 1915. Decided January 16, 1915.)

[145 Pac. 949.]

Sales—Warranty—Express and Implied—Burden of Proof—Rescission.

Sales—Rescission—Pleading and Proof—Insufficiency.

1. Where, in action on a note given in payment of a plow, defendant did not plead a rescission and his evidence did not show any demand for the note, and made it clear that his alleged offer to return the implement amounted to no more than a notification that it was at a certain place at plaintiff's disposal, the claim that his defense was based upon his right to rescind had no merit.

Same—Express Warranty—What Does not Constitute.

2. The statement by the seller of a plow that it had done good work for him at sod-breaking was not, in the absence of reliance thereon by the buyer, an express warranty.

[As to what constitutes warranty, see note in 94 Am. St. Rep. 209.]

Same—Second-hand Articles—Implied Warranty.

3. One knowingly buying a second-hand article from a person not a dealer or manufacturer, relying upon his own judgment, takes it unaccompanied by an implied warranty as to its fitness for a special purpose.

[As to circumstance that vendor assumes to assert fact buyer is ignorant of as test of warranty, see note in Ann. Cas. 1913C, 711.]

Same—Warranty—Burden of Proof.

4. Where breach of warranty of a piece of machinery for a certain purpose is relied upon, in an action to recover its purchase price, the burden of showing unfitness resting upon defendant is not sustained by evidence that upon a test it did poor work, unless it is also shown that the adjustment and operation were correct at the time of the test.

Appeal from District Court, Teton County; H. H. Ewing, Judge.

ACTION by Evan D. Jones against Bart Armstrong. From a judgment for plaintiff and an order denying defendant a new trial, the latter appeals. Affirmed.

Cause submitted on briefs of counsel.

Mr. David J. Ryan, for Appellant.

The purchaser may rescind a contract of sale and return the article when there is a breach of an express warranty, although there was no agreement to that effect and no fraud. (*Bryant v. Isburgh*, 13 Gray (Mass.), 607, 74 Am. Dec. 655, and note.) The purchaser's knowledge of the existence of a defect does not exempt the seller from liability upon his express warranty of the chattel. (*Stucky v. Clyburn*, Cheves L. (S. C.) 186, 34 Am. Dec. 590.) There is no defense against a warranty that the buyer might have discovered the defect by an examination of the article. (*Meickley v. Parsons*, 66 Iowa, 63, 55 Am. Rep. 261, and note, 23 N. W. 265.) An inspection by the buyer before acceptance will not deprive him of the protection of a warranty as to latent defects. (*Miller & Co. v. Moore etc. Co.*, 83 Ga. 684, 20 Am. St. Rep. 329, 6 L. R. A. 374, 10 S. E. 360.) A

vendor will be held liable for patent defects in an article sold if he so stipulates in a warranty. (*Watson v. Boode*, 30 Neb. 264, 46 N. W. 491.) A breach of warranty is a defense to a note given for the purchase money of property sold under a warranty, even though the note was executed subsequent to the time the contract of warranty was made. (*Gale-Sulky Harrow Mfg. Co. v. Stark*, 45 Kan. 606, 23 Am. St. Rep. 739, 26 Pac. 8; *Falconer v. Smith*, 18 Pa. 130, 55 Am. Dec. 611; *Toledo Sav. Bank v. Rathmann*, 78 Iowa, 288, 43 N. W. 193.) If a defect is latent, and is known and concealed by the seller, the rule of *caveat emptor* does not apply. (*Gold Ridge Min. Co. v. Tallmadge*, 44 Or. 34, 102 Am. St. Rep. 602, 74 Pac. 325; *Downing v. Dearborn*, 77 Me. 457, 1 Atl. 407.) There are strong intimations in some of the decided cases that the selling of an article for a sound price raises a warranty in law. (*Bailey v. Nickols*, 2 Root (Conn.), 407, 1 Am. Dec. 83; *Bowser & Co. v. Bathurst*, 91 Kan. 611, 138 Pac. 585; *Hodge v. Tufts*, 115 Ala. 366, 22 South. 422.)

Where one contracts to supply an article in which he deals, to be applied to a particular purpose, of which he is informed, under such circumstances that the buyer necessarily trusts to the judgment of the seller, there is a warranty implied that the article shall be reasonably fit for the purpose for which it is to be applied. (*Goldridge Min. Co. v. Tallmadge*, 44 Or. 34, 102 Am. St. Rep. 602, 74 Pac. 325; *McCaa v. Elam Drug Co.*, 114 Ala. 74, 62 Am. St. Rep. 88, 21 South. 479.) Where machinery is ordered from a dealer or manufacturer for special use, communicated to him at the time, the law implies a warranty that it is reasonably suitable and fit for the purpose for which it is sold and will perform the work for which it is designed. (*Kennebrew v. Southern etc. Machine Co.*, 106 Ala. 377, 17 South. 545.) An engine is ordinarily warranted by implication to answer the purpose for which it is sold. (*Lanz v. Wachs*, 50 Ill. App. 262.) The sale of personal property with a warranty of its fitness for a prescribed use may be treated as a sale upon conditions subsequent to the allegation of the purchaser, and in

the event of breach of warranty, the property may be restored and the sale rescinded. (*Mundt v. Simpkins*, 81 Neb. 1, 129 Am. St. Rep. 670, 115 N. W. 325; *American White Bronze Co. v. Gillette*, 88 Mich. 231, 26 Am. St. Rep. 286, 50 N. W. 136.)

Mr. R. Ferguson, for Respondent.

When an express warranty is set up, the pleader is precluded from relying on an implied warranty arising out of the same contract, even when the first relates to one quality and the other is sought to be implied with respect to an entirely different quality. (30 Am. & Eng. Ency. Law, 135, 136; *First Nat. Bank v. Hughes*, 5 Cal. Unrep. 454, 46 Pac. 272; *Cosgrove v. Bennett*, 32 Minn. 371, 20 N. W. 359; *Walter A. Wood Harvester Co. v. Ramberg*, 60 Minn. 219, 61 N. W. 1132.) In the sale of a second-hand chattel there is ordinarily no implied warranty of quality or that it is fit for the purpose for which it was made. (15 Am. & Eng. Ency. Law, 1240; *Ramming v. Caldwell*, 43 Ill. App. 175; *Holden v. Clancy*, 58 Barb. (N. Y.) 590; *Cogel v. Kniseley*, 89 Ill. 598.) The rule of *caveat emptor* applies where it is sought to enforce an implied warranty of quality or soundness of the article sold, when the buyer had an opportunity to inspect. (*Springfield Shingle Co. v. Edgcomb Mill Co.*, 52 Wash. 620, 35 L. R. A. (n. s.) 258, 101 Pac. 233; *Kullman, Salz & Co. v. Sugar Mfg. Co.*, 153 Cal. 725, 96 Pac. 369; *Browning v. McNear*, 145 Cal. 272, 78 Pac. 722.)

MR. JUSTICE SANNER delivered the opinion of the court.

Action by Evan D. Jones against Bart Armstrong, upon a promissory note given by the latter to the former for the sum of \$800, with interest at eight per cent per annum. The answer consists of denials and "a further and separate defense" wherein it is alleged that said note was given in payment of an Emerson plow purchased of Jones by Armstrong for sod-breaking; that Jones, who knew of the purpose for which the plow was desired, warranted and represented the same to be capable of first-class work in that respect; that these representa-

tions were untrue, and were known to Jones to be untrue; that Armstrong did not know, and could not ascertain, without a trial of the plow, that these representations were not true, and he relied upon them; that he took possession of the plow and gave it an immediate and fair test, as a result of which it was ascertained that the same was wholly unfit, and could not be used for breaking or any other purpose; that notice was forthwith given to Jones by Armstrong, who tendered back the plow and demanded the return of said note; that, in consequence of the failure of the plow to meet the representations made by Jones, Armstrong became unable to perform certain contracts which he had entered into, and lost the profits which would have accrued therefrom, and also sustained special damage in certain other respects, all in the sum of \$1,100, for which judgment is prayed. All these affirmative allegations are traversed by a general denial in the reply.

Upon the trial, which was to the court sitting with a jury, the plaintiff contented himself with the introduction of the note and testimony to the fact that it was due and wholly unpaid. On cross-examination it was elicited by defendant's counsel that the note was given in payment for the plow which he (Jones) had previously bought and used, and which had done satisfactory work for him.

The evidence on the part of the defendant was given by Armstrong himself and by the witnesses Hughes, Cawood and Price. Armstrong testified: "I went to see Mr. Price, and asked him if he had what is known as the Emerson plow, sod-bottom plow, and disc plow. He said he didn't have one. He was the agent for this plow at Conrad at this time, and I asked him if he knew of one, if I could locate one. He said he thought Evan Jones over east of town had a plow that he wanted to sell. So Mr. Price drove me out there in his automobile, and we saw Mr. Jones and saw the plow. The plow at this time had the discs. It was not rigged for sod-bottom plowing. It was a three-section Emerson plow, susceptible of sod-bottom, as all are supposed to be. Mr. Jones made a price on this plow of \$300. Mr.

Price and I went back, and I talked to Mr. Price about this plow, and I asked him if this plow could be guaranteed to give satisfaction or to do good plowing. He said it could; that the Emerson was behind the plow as long as a man saw fit to operate it. * * * I met Mr. Jones two times. I am not sure which time it was that he spoke about the plow. He said the plow did good work for him; that was with the sod-bottoms on. I think he said he plowed sixty acres with sod-bottoms—probably not that much. I told him I wanted to use the plow for sod-bottom breaking. * * * When I got the plow it was hitched to the engine, and I took it out to the ranch. I used it two or three times; we tried it out on the prairie sod. * * * After the plow was used three times, I guess there were some ten or twelve acres we had gone over and tried to plow. It was not a good piece of plowing. I don't know that I knew what was the trouble with it. * * * One of the front sections cut too deep; the rear section would not run deep enough; and each section in the middle or center is worked by one lever. If the front section run too deep, you raised the lever, and that throws the plows of the rear section out of the ground. There was no adjustment as to the depth of the plows, other than the four levers. These four levers covered the plow or the depth of all the plows that was strung on the two sections from this frame. I had the same man on the engine that plowed for Mr. Jones, and I was looking after the plows myself also. * * * The fault was not in the plow; the fault was in the place that it seemed to swing on—in the frame of the plow. * * * The plow would not plow uniformly. It had that fault of running too deep and running too shallow, and also had the fault of piling the sod up instead of folding it over. * * * After using the plow for three times, I wrote Mr. Jones that the plow was there at his disposal. I could not use the plow. I told him it would not do the work and did not answer the purpose for which I purchased it. * * * ” Upon cross-examination Mr. Armstrong further testified: That he had operated an Emerson plow before this in the disc frame, but not in the sod-bottom frame.

"To say that I know why the plow did not work properly would involve a good deal. The construction frame that carries these plows was not so mechanically built as to carry the plows evenly and regulate them in the ground. * * * There would be two cables to adjust, and you must have these cables so they would carry the beams squarely in front of the plow, or carry the beam in right angles behind the engine or parallel with the rear of your engine. * * * When I first went to see Mr. Jones about buying the plow it was the time I talked to Mr. Price; I went out once, and I might have gone twice. * * * I asked him to reduce the price, but he said I could take it for \$800 or leave it." On redirect examination he said with reference to Jones' statement that the plow had done good work for him: "I took the statement for what it was worth. I relied upon Mr. Price as agent for the Emerson plow people. * * * I relied upon both Mr. Price's statement and Mr. Jones' statements in purchasing the plow."

David Hughes testified: "I was plowing for Mr. Jones with an Emerson plow, sod-bottom breaking part of the time. * * * I don't think the mold-board was not good plowing. This plowing was good. * * * The work did not suit Mr. Jones. * * * It was the bottoms—the mold-boards. * * * I had no experience before that in handling Emerson plows. I adjusted the cables on the plows. I don't know the regulation length of the cable for No. 1 beam or No. 2; we adjusted them and changed them so as to try to make the plows work."

Cawood testified that he "saw some ground that had been plowed by this Emerson plow. * * * The plowing * * * was poor. * * * I do not know what was wrong with the plow. * * * I do not know whether it was the fault of the plow or the fault of the man that operated it that accounted for the bad plowing."

Price testified that the plow was second-hand when sold to Mr. Jones and third-hand when sold to Mr. Armstrong.

At the conclusion of the testimony the plaintiff moved the court to direct the jury to return a verdict in favor of the plain-

tiff, which was done, and, upon the verdict so returned, judgment was entered. Thereafter motion for new trial was made and overruled. The defendant has appealed from this judgment and order.

The only question presented is whether the evidence on the part of the defendant tended to establish any defense under the allegations of the answer. He contends that it did, upon what theory we are unable to precisely determine. The first part of his argument is devoted to a discussion of the right of rescission [1] for fraud and for failure of consideration. Neither the answer nor the evidence affords any warrant for the application of rescission. While the answer alleges an offer to return the plow and a demand for a return of the note, it presents no other allegations pertinent to rescission, but contains many that indicate a contrary position, viz., reliance upon a breach of warranty as a defense and as the basis for an award in damages. Upon the evidence, the case is still worse, so far as rescission is concerned. Demand for the note is not mentioned, and the offer to return dwindles to a mere notification—insufficient as a return or offer to return—"that the plow was there at his disposal." (*Berlin Machine Works v. Midland C. & L. Co.*, 45 Mont. 390, 123 Pac. 396.)

The defendant also insists that he made a sufficient showing to go to the jury upon the theory of a breach of warranty; such warranty being both express and implied. Plaintiff argues that one cannot defend upon an express and implied warranty touching the same quality. This we need not consider, for reasons presently to appear. To begin with, no express warranty on the [2] part of plaintiff was shown, in our opinion. So far as the plaintiff himself is concerned, this express warranty is supposed to exist by virtue of his statement that the plow had done good work for him at sod-breaking. This was not a warranty. (30 Am. & Eng. Ency. Law, 142; *Worth v. McConnell*, 42 Mich. 473, 4 N. W. 198.) It was a representation which, to become a warranty, had to be relied on as such. (30 Am. & Eng. Ency. Law, 143.) That it was not relied on is clear from defendant's testi-

mony that he "took it for what it was worth"; that he "relied on Mr. Price as agent for the Emerson plow people"; that he "relied on both Mr. Price's statement and Mr. Jones' statements in purchasing the plow." In avoidance of this the defendant, in a vague and indefinite sort of a way, seems to contend that Price was an agent of plaintiff, and that his declarations, together with those of Jones, are sufficient to establish the warranty. We think it clear that Price was not the agent of anybody in this transaction; his function being merely that of an obliging merchant whose assistance had been solicited by the defendant himself.

As to the implied warranty, the defendant's situation is no [3] better. He did not go to Jones as the dealer or manufacturer of an article with which he was unacquainted. He had had some experience with the Emerson plow; that was the plow he started out to buy. He applied to plaintiff because that was the sort of plow the plaintiff had to sell. Defendant knew that plaintiff was not a dealer or manufacturer, and that the plow was a second-hand one. From these circumstances no implied warranty by the plaintiff can arise touching the original fitness of the plow for sod-breaking. (35 Cyc. 408; 15 Am. & Eng. Ency. Law, 1240; *Ramming v. Caldwell*, 43 Ill. App. 175; *Cogel v. Kniseley*, 89 Ill. 598; *Joy v. National Exch. Bank*, 32 Tex. Civ. App. 398, 74 S. W. 325.) Our statute (Rev. Codes, sec. 5104) provides: "Except as prescribed by this article, a mere contract of sale or agreement to sell does not imply a warranty." And the only exceptions, so far as warranty of quality of examinable merchandise is concerned, are when the buyer relies upon the seller's judgment, the latter knowing that fact, and where the sale is made by the manufacturer or dealer. That neither exception can be applied here is obvious.

Assuming, however, that there was a warranty of the plow as fit for sod-breaking, the evidence, we think, falls short of [4] establishing its breach. To show that upon a test it did poor work is not to show its incapacity to do good work. Clearly deducible from the evidence is the fact that adjustment and oper-

ation had much to do with the results achieved, and the defendant failed to show that the adjustment and operation were correct upon the test. The burden of showing unfitness was upon the defendant, and Cawood's remarks, "I don't know whether it was the fault of the plow or the fault of the man that operated it," must have expressed the view of the trial court upon the whole evidence, as it certainly expresses ours.

We think the order directing a verdict for the plaintiff was justified. That being so, the judgment and order appealed from were correct and must be affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

McLAUGHLIN, APPELLANT, v. BARDESEN ET AL., RE-
SPONDENTS.

(No. 3,442.)

(Submitted January 5, 1915. Decided January 18, 1915.)

[145 Pac. 954.]

Personal Injuries—Realty—Duty of Owner Toward Trespasser—Cities and Towns—Excavations—Mines and Mining—Statutes—Presumptions—Negligence—Wantonness—Nonsuit—Error.

Statutes—Interpretation—Means Available.

1. The arrangement and classification of statutes, their titles and headings, are proper and available means from which to determine legislative intent.

[As to rules of construction of statutes, see note in 12 Am. St. Rep. 826.]

Penal Statutes—Extension by Implication.

2. A highly penal statute cannot be extended by implication.

Mines and Mining—"Cut"—Definition.

3. The word "cut" when used in conjunction with "shaft" and "drift," held to mean a surface opening in the ground intersecting a vein.

Same—Cities and Towns—Statutes—Excavations.

4. Held, that section 8535, Revised Codes, making it obligatory on persons sinking shafts or running drifts or cuts within the corporate limits of a city, etc., to properly guard the same under a heavy penalty

for failure to do so, has no application to a ditch or trench temporarily opened for the purpose of laying sewer-pipe.

Same—Cities and Towns—Ordinances—"Excavations"—Definition.

5. An ordinance making it unlawful to permit any "shaft, drift or prospect hole or other excavation" to remain unguarded within the limits of a city where mining is the principal industry, held not to be susceptible of application to a trench dug for sewer-pipe purpose, the words "or other excavation," under the rule of *ejusdem generis* or *noascitur a sociis*, being referable to an excavation made in the course of prospecting or active mining.

Real Property—Occupancy—Presumptions.

6. In the absence of evidence to the contrary, one's occupancy of a house must be treated as rightful; no inference of wrongful occupancy being permissible.

Same—Duty of Owner Toward Trespasser—Common-law Liability.

7. At common law the land owner is required merely to refrain from any intentional or wanton acts occasioning injury to a trespasser upon his property.

[As to expulsion of trespassers, see note in 93 Am. St. Rep. 254.]

Same—Who Deemed Owner.

8. Persons in possession of land under an easement must be treated as the owners for the purpose of determining whether they owed any duty to one who sustained personal injuries while upon the premises.

Same—Negligence of Owner—Wantonness—What may Constitute.

9. Wantonness on the part of a land owner causing injury to a trespasser may be shown by acts of omission as well as by acts of commission, where the facts disclose a reckless disregard of the lives or safety of others.

Appeal and Error—Nonsuit—Evidence of Plaintiff—How Viewed.

10. On appeal from a judgment rendered on a nonsuit, the evidence will be considered in the view most favorable to plaintiff, and every fact which the evidence tends to prove treated as proved.

Personal Injuries—Negligence of Land Owner—Wantonness—Evidence—Nonsuit—Error.

11. Evidence of plaintiff held to have made out a *prima facie* case of common-law liability on the part of defendant contractors, because of their reckless disregard of the lives and safety of others, it being shown that they dug a deep trench across a well-defined path over uninclosed land which had been used by the public for several years in going to and coming from their homes, defendants leaving the excavation unguarded and unprotected for a period covering two or three weeks, as a consequence of which negligence plaintiff, not knowing of the existence of the trench, fell into it in the night-time and was injured; hence the court erred in granting a nonsuit.

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by Katie McLaughlin against R. M. Bardsen and others, partners as R. M. Bardsen & Co. From a judgment rendered on a nonsuit, plaintiff appeals. Reversed and remanded.

Mr. James M. Hinkle, for Appellant, submitted a brief, as well as one in reply to that of Respondents, and argued the cause orally.

There are three questions involved in this appeal, either one of which, if decided in favor of the appellant's contention, will entitle appellant to a new trial of this action: 1. Liability of defendants under the general law of negligence; 2. Liability under the state law of Montana; 3. Liability under the ordinances of the city of Butte.

Statutory and common-law liability may be joined in the same action. In the case of *Smith v. Denver & R. G. Ry. Co.*, 54 Colo. 288, 130 Pac. 1009, the court goes into the question of statutory and common-law liability; also in *Crissey & F. Lum-ber Co. v. Denver etc. Ry. Co.*, 17 Colo. App. 275, 68 Pac. 670. (See, also, 1 Thompson on Negligence, secs. 10-13; *Rogers v. Ponet*, 21 Cal. App. 577, 132 Pac. 851.)

Common law: "The common law is reason dealing by light of experience in human affairs." (6 Ency. Law, 269.) Most personal injury cases are common-law actions. *Birsch v. Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940, and *Bourke v. Butte etc. Power Co.*, 33 Mont. 267, 83 Pac. 470, were common-law actions. The statute and city ordinance only prescribe specific duties on persons digging ditches at such places, and make a penalty for violations of such duties, but they do not change, nor take from, the common-law liability for negligence, in leaving said ditch in such condition. Under them the violation thereof is negligence *per se*; under the common law it is a question for the jury to determine from all the acts and circumstances whether there was negligence. We insist that this case should have been submitted to the jury for its determination on the question of negligence.

The case of *De Tarr v. Ferd. Heim Brewing Co.*, 62 Kan. 188, 61 Pac. 689, is also a common-law case, and the facts in that case are almost the same as the case at bar. In that case there was a privy vault left open on a private lot which people were accus-

tomed to cross and the plaintiff fell in and was injured. The case at bar is a stronger case of negligence, for the reason that the ditch was across the road. The following are common-law negligence cases: *Schwartz v. California Gas & Elec. Co.*, 163 Cal. 398, 125 Pac. 1044; *Barnes v. Brown*, 95 Mich. 576, 55 N. W. 439; *Muller v. Hale*, 138 Cal. 163, 71 Pac. 81; *Riley v. Northern Pac. R. Co.*, 36 Mont. 545, 9 Ann. Cas. 847, 5 L. R. A. (n. s.) 536, 93 Pac. 948; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197; *Davoust v. City of Alameda*, 149 Cal. 69, 84 Pac. 760; *Hanson v. Spokane Valley L. & Water Co.*, 58 Wash. 6, 107 Pac. 863; *Hill v. President etc. University*, 61 Or. 190, 121 Pac. 901; *Carskadon v. Mills*, 5 Ind. App. 22, 31 N. E. 559.

A recent case, *Connally v. Woods*, 39 Okl. 186, 134 Pac. 869, is a common-law negligence case, and is decisive of the principle contended for by appellant, *viz.*, that it is a common-law liability to be submitted to the jury. In that case an excavation was dug on the owner's private lot near another house and away from a public highway. Plaintiff fell in and was injured, held that there was a liability.

Statutory liability: We contend that the court erred in its construction of section 8535, Civil Code, especially the latter part of said section wherein the legislature uses the words "mining, irrigating and other ditches." Counsel cited a number of authorities as an inducement to the court to construe the said section of the statute to mean only "mining and irrigating ditches" and to disregard "other ditches" mentioned by the legislature. Our contention is that the intention of the legislature is so plain that there can be but one construction put upon it, *viz.*, that it means other ditches besides mining and irrigating ditches.

In construing a statute the intention of the legislature must control, and the language used must be construed so that every word and phrase must be given its meaning and not be disregarded. (Endlich on Interpretation of Statutes, secs. 1, 2, 4, 6, 58; 36 Cyc. 1114; *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 8 Ann. Cas. 717, 82 Pac. 833; 2 Current Law,

p. 1724.) Every word should be given full effect, if possible. (2 Current Law, 1727; *State v. Cave*, 20 Mont. 468, 52 Pac. 200; *Hedges v. County Commissioners*, 4 Mont. 280, 1 Pac. 748.) As to proper construction of the word "other," see *Kansas City etc. Ry. Co. v. Wallace*, 38 Okl. 233, 132 Pac. 909, 46 L. R. A. (n. s.) 112. Failure to observe the duty imposed by section 8535, Revised Codes, is negligence, and creates a civil liability for damages. (*Conway v. Monidah Trust Co.*, 47 Mont. 269, 132 Pac. 26.) We submit that under the pleadings and evidence in this case the plaintiff not only made out a good case for liability under the common-law rule of negligence, but also a good case under the provisions of section 8535 in connection with sections 6040, 6041 and 5051.

Liability under city ordinance: The same law of construction and rule contended for by the appellant for liability under the statute equally applies to the liability under the city ordinance, and without repeating what is said and the cases cited under the statutory liability, reference is made with equal force to that part of the brief and argument as applicable to the liability under the city ordinance. The city having the authority to pass laws for the protection of the people within its limits, such laws are just as binding and enforceable as if they were laws passed by the legislature.

Messrs. J. L. Wines and T. J. Harrington, for Respondents, submitted a brief. *Mr. Wines* argued the cause orally.

Our contention is that appellant has failed to show any common-law liability. We deem it unnecessary to cite authorities in support of our position, that neither the existence of a highway nor street by the action of the public authorities, nor by dedication upon the part of the owner, has been shown. The cases which we shall cite fully support our contention that no highway or street has been shown by user, and consequently there is no common-law liability, for the reason that to create a common-law liability it must have been shown that the sewer in question was dug so near a highway or street that it became

dangerous to persons passing along such highway or street. If dug upon private property by those having a right of way therefor, it is not within the exception to the general rule stated. There is no escape from the fact that the sewer where appellant fell was either constructed upon or near a public highway or street, or that it was dug upon private property and at least one hundred feet from any highway or street. No recognition by the public authorities to any extent whatever has been attempted. This will be considered as being a strong circumstance against the open space in question having ever been considered by the public as a street or highway. (Elliott on Roads and Streets, 137; *State v. Auchard*, 22 Mont. 14, 55 Pac. 361; *State v. Horn*, 35 Kan. 717, 12 Pac. 148; *Shellhouse v. State*, 110 Ind. 509, 11 N. E. 484.) As to the duty of respondents in this case, see 1 Thompson on Negligence, sec. 1228; *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74; *Redigan v. Boston etc. R. R. Co.*, 155 Mass. 44, 31 Am. St. Rep. 520, 14 L. R. A. 276, 28 N. E. 1133; *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223; *Murphy v. City of Brooklyn*, 118 N. Y. 575, 23 N. E. 887; s. c., 98 N. Y. 642; *Egan v. Montana Cent. R. Co.*, 24 Mont. 569, 63 Pac. 831; *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373. This rule is clearly stated in 29 Cyc. 444, 445.

No liability under section 8535, Revised Codes: Was there any liability in this case under the provisions of section 8535 of the Revised Codes? Taking the whole history of legislation upon the subject, the rule seems to be fairly well settled that the word "cut" found in the section can only apply to a "cut" in connection with mining operations, and, for the same reason, the word "other ditches" in the same section can only apply to and mean ditches connected with the business of mining or irrigation, and therefore cannot include a sewer. Sutherland on Statutory Construction, section 268, uses this language: "When there are general words following particular and specific words, the former must be confined to things of the same kind." (Also see sec. 273; 36 Cyc. 1119, 1920, and note 40; *Greenville Ice & Coal Co. v. City of Greenville*, 69 Miss. 86, 10 South. 574; *State*

v. *Dinnisse*, 109 Mo. 434, 19 S. W. 92; *American Manganese Co. v. Virginia Manganese Co.*, 91 Va. 272, 21 S. E. 466; *People v. New York & M. B. Ry. Co.*, 84 N. Y. 565; *State v. Black*, 75 Wis. 490, 44 N. W. 635.) The decision of this court in the case of *Conway v. Monidah Trust*, 47 Mont. 269, 132 Pac. 26, does not militate against the position taken by respondents, for the reason that the facts in that case brought it clearly within the provisions of section 8535, that being a mining shaft into which the plaintiff fell.

No liability in this case under the city ordinance plead by plaintiff: If there was no liability under section 8535, then it is evident that there can be no liability under the city ordinance, and what we said in support of our position that there is no liability under the statute, will equally apply in this portion of our argument. The prohibitive words in the ordinance only apply to "any shaft, drift, prospect hole or other excavation." The words "shaft, drift, prospect hole" can only apply to mining operations.

We also take the position that the city ordinance should not be considered, for a further reason. It is true the rule is quite well settled that a civil liability for damages exists where damages result from a breach of a prohibitive statute, yet the same is not true where the breach consists of a violation of a city ordinance. Evidently for the purpose of bringing this case within the terms of the city ordinance, appellant alleges in her complaint that the place where appellant fell was a "common." The definition of the word "common" is so well known, and in view of the fact that no effort was made to show that the place where appellant fell was upon, or in or constituted a part of a "common," we do not consider that this phase of the case demands any further notice.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In September, 1912, the city of Butte let a contract to Bardsen, Hammer and Larson to install a public sewer for the city,

and in execution of the agreement the contractors caused to be excavated a trench in which to lay the sewer-pipe. The line of sewer was parallel with and about 100 feet from Anaconda Road, a public street of the city. One portion of the sewer trench within the city limits was in front of, and but a few feet from, the house occupied by Dan Martin, designated No. 27 Anaconda Road. During the progress of the work the contractors were delayed for fifteen days or more, and during that interval the trench in front of the Martin home was left open. As soon as the pipe could be laid after work was resumed, the trench was filled. There was a path or roadway leading from Anaconda Road to the north to the Martin home and to other houses in the immediate neighborhood, and the section of the trench in front of the Martin house, about three feet wide, twelve feet long, and twelve or thirteen feet deep, extended across, or at least two or three feet into, this path or roadway and was left open and unguarded, and without lights or other signals to indicate danger. During the time the work was interrupted, and on the evening of October 13, 1912, when it was so dark that the excavation could not be seen, and when its existence was unknown to her, Katie McLaughlin, while traveling along this path or roadway north from Anaconda Road, to visit at the Martin home, fell into the trench in front of the Martin house and was severely injured. She brought this action against the contractors to recover damages, but the trial court nonsuited her, and these appeals are prosecuted to have determined whether upon the agreed facts, and the evidence offered by the plaintiff supplementary thereof, there is shown any liability on the part of the contractors.

Concerning the path or roadway, the witness Martin testified: "There was a well-beaten road or traveled way leading from Anaconda Road up to my house and on up beyond my house that people traveled on going back and forth from Anaconda Road up to and past my house. There were many people traveled that way. It was the only way to go from Anaconda Road up in that neighborhood. There were a good many houses up

in that neighborhood. The defendants dug this ditch easterly and westerly in front of my house. My house faces south toward Anaconda Road."

Frank Reynolds testified: "I have known that traveled way leading up from Anaconda Road for about seventeen years. I traveled over it that long ago, and have traveled over it different times since. It was a well-beaten traveled way. It ran up between two dumps, about twelve or fifteen feet apart, from Anaconda Road up past where Dan Martin's house is to the neighborhood beyond, and was the only way of going up that way. There is a crossing in the sidewalk where this traveled way leaves Anaconda Road. There were no sidewalks on either side of this traveled way. * * * I have traveled over that traveled way from Anaconda Road up that way in the last seventeen years about four times. After you get up to Dan Martin's house then the paths branch off different ways to go to the different places and houses in that neighborhood."

Mrs. Martin and the plaintiff were intimate friends, accustomed to visit each other at their respective homes, and the path or roadway leading to the Martin home from Anaconda Road was well known to the plaintiff. There is not any evidence in the record as to who owned the land at the point where the accident occurred; but defendants had secured a right of way for the sewer, and from that fact it may be inferred that the land was held in private ownership. It was, however, open and uninclosed. There is not any evidence that the owner knew of the use of his property by the people of the vicinity or the existence of the path or roadway, which, so far as the record discloses, was not a public thoroughfare of any character.

Statutory Liability. Section 8535, Revised Codes, provides: "Every person who sinks any shaft or runs any drift or cut, or causes the same to be done, within the limits of any city or town or village in this state, or within one mile of the corporate limits of any city or town, or within three hundred feet of any street, road or public highway, and who shall fail to place a substantial cover over or tight fence around the same, is punishable by a

fine not exceeding one thousand dollars (\$1,000). * * * Mining, irrigating and other ditches may be dug or cut to a depth not exceeding ten feet without incurring the penalty of this section." This statute was first enacted in 1871 (Codified Stats. 1871, p. 593), and with very slight amendments has been [1, 4] brought forward to the present time. The arrangement and classification of statutes, their title and headnotes, are all proper and available means from which to determine legislative intent. (*Hardesty v. Largey Lumber Co.*, on rehearing, 34 Mont. 160, 86 Pac. 32; *In re Wisner*, 36 Mont. 298, 92 Pac. 958.) Chapter 81 of the Laws of 1871, above, was entitled "Mines and Prospectors." The statute made it a misdemeanor for anyone to sink a shaft or run a drift or cut within twenty feet of a trail, road or public highway, unless within ten days such opening was protected by a substantial covering or fence. With slight modifications, the statute was incorporated in the Compiled Statutes of 1887 (sec. 255, Fourth Division) under the headnote, "Leaving Open Shaft or Cut Within Twenty Feet of Highway." Substantially the same statute was brought into the Penal Code of 1895 (section 704), without title or headnote. The sixth legislative assembly passed an Act entitled: "An Act to amend section 704, in title X of part I, of the Penal Code of * * * Montana, relating to exposed shafts, and providing a penalty for failure to inclose and protect the same." (Laws 1899, p. 149.) This amendment extended the statute so as to prohibit such open shafts, cuts and drifts within the limits of any city, town or village, and increased the maximum punishment for its violation. Into the Revised Codes of 1907 the statute, as amended in 1899, was brought forward under the heading "Protecting Mining Shafts in City." (Sec. 8535, above.) In the Acts of 1871, 1887 and 1895, certain mining and irrigating ditches were particularly excepted from the operation of the respective statutes. In the amendment of 1899, mining, irrigating and other ditches, not more than ten feet deep, were excepted, and such is the state of the law to-day.

Counsel for appellant contends that, by excepting mining, irrigating and other ditches not more than ten feet deep, the legislature must have intended that a ditch of any character more than ten feet deep was intended to be included within the prohibited list. But this argument if given effect would operate [2] to extend a highly penal statute by implication merely, in violation of the most elementary rule of statutory construction. (*In re Wisner*, above; 36 Cyc. 1186.) "In order to enforce a penalty against a person, he must be brought clearly within both the spirit and letter of the statute." (36 Cyc. 1187.)

In every one of the Acts above mentioned, the only things prohibited are sinking a shaft or running a drift or cut. When the statute was first enacted, each of these terms had, and ever since has had, a well-defined and generally understood meaning. Each referred to an operation in mining, and to nothing else; at all times each has been a strictly mining term. In its broad [3] significance, the word "cut" may have a meaning other than that employed in mining; but when used in conjunction with "shaft" and "drift" it means a surface opening in the ground intersecting a vein. "*Copulatio verborum indicat acceptionem in eodem sensu.*" Our conclusion, from the history of section 8535 and the prohibitive language employed, is that it was never intended to apply to a ditch or trench temporarily opened for the purpose of laying sewer-pipe.

Liability Under City Ordinance. At the time this accident occurred there was in force an ordinance of the city of Butte [5] (No. 218) which declared it to be unlawful "for any person or persons, company or corporation to permit or allow any shaft, drift, prospect hole or other excavation owned or controlled by them or it to remain open and unguarded by a proper covering of two-inch planks or a suitable fence at least four feet high and substantially constructed within the limit of the city of Butte, unless the same is properly guarded or patrolled by one or more persons "during the entire day and night." A fine of \$100 might be imposed for a violation of this ordinance.

It is very clear that the sewer trench in question cannot be classified as a "shaft," "drift," or "prospect hole." Each of those terms has a well-defined and generally understood meaning in this state, and particularly in Butte, where mining is the principal industry. But it is insisted that the terms "or other excavation" are sufficiently broad to include the trench in question. If the prohibition of the ordinance was directed against any excavation being left unguarded, appellant's contention would prevail. But since the words "or other excavation" follow immediately after the specific enumeration "shafts," "drifts," "prospect holes," the rule of statutory construction exemplified by the expression "*ejusdem generis*," or "*noscitur a sociis*," requires the word "excavation" to be employed to mean some other opening in the ground of the same class of shafts, drifts and prospect holes. As applied to the ordinance in question, the rule requires the conclusion that it was the intention of the city council of Butte to use the terms "other excavation" as meaning, and to refer to, some other excavation made in the course of prospecting or active mining. (*City of Kalispell v. School District*, 45 Mont. 221, Ann. Cas. 1913D, 1101, 122 Pac. 742; *Helena L. & Ry. Co. v. City of Helena*, 47 Mont. 18, 130 Pac. 446.) The record fails to disclose liability on the part of these respondents arising from any supposed violation of Ordinance 218.

Common-law Liability. Because of the extreme meagerness of this record and the absence therefrom of material facts which it is apparent could have been proved, we are required to treat this appellant, in the first instance, as a technical trespasser at the time of the accident and determine her rights, if any she has, accordingly. In the absence of any evidence as to the [6-9] ownership of the Dan Martin house, and other houses in that neighborhood accommodated by the path or roadway leading north from Anaconda Road, no inference of wrongful occupancy can be drawn. Martin's occupancy must be treated as rightful for the purposes of this case, if that is a material fact. (*Bourke v. Butte El. Ry. Co.*, 33 Mont. 267, 83 Pac. 470.)

The rule at common law imposed upon the land owner the duty only to refrain from any intention or wanton acts occasioning injury to a trespasser upon his property. (*Egan v. Montana Cent. Ry. Co.*, 24 Mont. 569, 63 Pac. 831; *Conway v. Monidah Trust*, 47 Mont. 269, 132 Pac. 26.) The exceptions to that rule are not material here. Since these defendants were in possession of the land at the place of injury and had an easement in the property, they are to be treated as the owners for the purposes of these appeals. That wantonness may be shown by acts of omission as well as by acts of commission, where the facts disclose a reckless disregard of the lives or safety of others, is a rule of law now generally recognized and was referred to approvingly by this court in *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373. There cannot be any rigid standard by which to determine whether wantonness in a given instance has been shown. Every case must depend upon its own peculiar facts and circumstances. It is the rule, repeated so often that it may fairly be said to have become axiomatic in the law of this state, [10] that, on appeal from a judgment rendered on a nonsuit, this court will consider the evidence in the view most favorable to the plaintiff and treat every fact as proved which the evidence tends to prove. Tested by that rule, the evidence discloses that the path or roadway, where the accident happened, was so plainly marked on the ground and had been subjected to such general and notorious use, and for such length of time, that the defendants knew of its existence and use, or, what amounts to the same thing, will be held chargeable with that knowledge. The facts, then, disclose uninclosed lands over [11] which the public (that is, the people of a considerable community or neighborhood) had been accustomed to pass for several years, until a well-defined path or roadway had become plainly marked upon the ground, and the owners of that ground excavating a dangerous trench into or across such path or roadway, and leaving the same uncovered, unguarded and unprotected for two or three weeks, without warning or notice of any kind or character, and with the knowledge that people accus-

tomed to use the path or roadway might reasonably be expected to use it under such circumstances that injury to them would result. If this does not make out a *prima facie* case of reckless disregard of the lives and safety of others, then it would be difficult to imagine a state of circumstances which would do so. The authorities bearing upon this subject, and cases presenting similar facts and declaring liability under them, are: 29 Cyc. 470; Wharton on Negligence, sec. 349; *Morrow v. Sweeney*, 10 Ind. App. 626, 38 N. E. 187; *Gravès v. Thomas*, 95 Ind. 361, 48 Am. Rep. 727; *Penso v. McCormick*, 125 Ind. 116, 21 Am. St. Rep. 211, 9 L. R. A. 313, 25 N. E. 156; *Connally v. Woods*, 39 Okl. 186, 134 Pac. 869.

From the admitted facts, the evidence of plaintiff, and the fair inferences to be drawn therefrom, we conclude that a *prima facie* case, based upon the defendants' common-law liability, was made out, and that the trial court erred in sustaining the motion for nonsuit.

In what has preceded we have treated the plaintiff as a technical trespasser. It is an open question whether she was not shown to be a licensee (*Carskaddon v. Mills*, 5 Ind. App. 22, 31 N. E. 559), or present at the place of danger by the implied invitation of the defendants. (*De Tarr v. Heine Brewing Co.*, 62 Kan. 188, 61 Pac. 689.)

The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

WHERRY, APPELLANT, v. SPRINKLE ET AL., RESPONDENTS.

(No. 3,455.)

(Submitted January 8, 1915. Decided January 20, 1915.)

[146 Pac. 735.]

Appeal—Presumptions—Burden of Showing Error on Appellant.

1. On an appeal from an order granting a new trial made by a judge other than the one who heard the cause, the appellant, as in all other cases, has the burden of overcoming the presumption that the ruling appealed from is correct; hence where no error is assigned nor any attempt made to show the impropriety of the order appealed from, affirmance of the order follows.

Appeal from District Court of Blaine County; John W. Tattan, Judge.

ACTION by Tollie F. Wherry against Chas. E. Sprinkle and another. Judgment for plaintiff, who appeals from an order granting defendant a new trial. Affirmed.

Mr. W. B. Sands, for Appellant, submitted a brief and argued the cause orally.

Mr. R. E. O'Keefe and *W. H. Kuhr*, for Respondents, submitted a brief; *Mr. O'Keefe* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

This cause was tried in the district court of Blaine county before Hon. Frank N. Utter, one of the judges thereof. Verdict and judgment were for the plaintiff, and defendants moved for a new trial assigning all the statutory grounds. Judge Utter, having been disqualified, called upon Hon. John W. Tattan, the other judge of said court, to hear and determine the motion, and he, by a general order, granted the same. This appeal is from that order.

The appellant, laboring under the mistaken notion that the burden is on the respondent to vindicate the order, assigns no

[1] error nor seeks in any way to show its impropriety. It has been too often repeated to require citation that this court approaches every case with the assumption that the ruling appealed from is correct. The fact that the judge who made the order was not the one who presided at the trial affects the indulgence with which we view his judgment on the evidence, but does not deprive him of all judicial faculty in passing upon the record. (*In re Williams' Estate, ante*, p. 142.) On appeal from such an order, therefore, as in all other cases, the appellant must take the burden.

There being nothing before us upon which the order appealed from may be questioned, the same is accordingly affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied March 9, 1915.

BELLER, APPELLANT, v. LE BOEUF ET AL., RESPONDENTS.

(No. 3,450.)

(Submitted January 6, 1915. Decided January 20, 1915.)

[145 Pac. 945.]

*Default Judgments—Setting Aside—Grounds—Presumptions—
Conflicting Affidavits—Effect—Record on Appeal—Sufficiency.*

Appeal and Error—Default Judgment—Record.

1. On appeal from an order vacating a default judgment, the judgment-roll is no part of the record; the papers used on the hearing resulting in such order, constitute the record and must be authenticated by their incorporation in a bill of exceptions duly settled by the presiding judge.

Same—Record—Sufficiency.

2. On appeal from an order vacating a default judgment, a transcript certified by the clerk as a true copy of plaintiff's bill of exceptions, purporting to be a narrative of the proceedings had and done in respect to the motion to vacate and to contain all the papers relative thereto, and settled and certified by the judge as a true and correct

record of the proceedings, sufficiently complied with section 7118, Rev. Codes, relative to what the record on appeal in such cases shall contain.

Default Judgment—Vacation—Grounds—Presumptions.

3. Where, on a motion to vacate a default judgment, there was no showing whatever of excusable neglect or of the existence of any meritorious defense, it must be assumed that the order vacating the judgment was not made on discretionary grounds.

Same—Conflicting Affidavits—Conclusive, When.

4. Where the only ground upon which an order setting aside a default could be justified was that the judgment was premature and therefore void, and the affidavits of opposing counsel as to when service of the complaint was made were conflicting, the ruling of the trial court was conclusive.

Appeal from District Court, Sanders County; R. Lee McCulloch, Judge.

ACTION by Alfred Beller against Gilbert Le Boeuf and others, partners under the firm name and style of Moser & Campbell. From an order setting aside a default judgment, plaintiff appeals. Affirmed.

Messrs. I. R. Blaisdell and H. J. Burleigh, for Appellant, submitted a brief.

Mr. Gerard Young and Mr. H. C. Schultz, for Respondents, submitted a brief; Mr. Young argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

In this action a demurrer to the complaint on behalf of defendants Moser and Campbell was sustained. Thereafter an amended complaint was filed by plaintiff and a copy thereof served on counsel for said defendants. The date of the filing is September 13, 1913. The date of the service is disputed. On October 4, 1913, the plaintiff filed his *praecipe* for the default of said defendants for their failure to answer or demur, which default was noted in due form, and on the same day judgment by the clerk was entered conformably to the plaintiff's prayer. Thereafter a motion on behalf of said defendants was made to open the default and vacate the judgment, which motion

was accompanied by affidavits intended to be in support thereof. The motion was granted. Hence this appeal.

The respondents (defendants below) challenge the right of [1] appellant to be now heard, upon the ground that: "The transcript herein fails to show either the judgment-roll or an authentication and identification of the papers used on the hearing of the motion, * * * either in the body of the bill of exceptions or in the certificate of the presiding judge, and the certificate of the clerk fails to certify to all the papers in the transcript." There is nothing in this. The case is before us on appeal, not from the judgment, but from an order made after judgment. The judgment-roll is therefore no part of the record (*Emerson v. McNair*, 28 Mont. 578, 73 Pac. 121); but the papers used on the hearing which resulted in the order appealed from, constitute the record, and these must be authenticated by their incorporation in a bill of exceptions duly settled by the presiding judge. (*Latimer v. Nelson*, 47 Mont. 545, 133 Pac. 680.) Now, the transcript before us is certified by the clerk as [2] a full, true, and correct copy of plaintiff's bill of exceptions. This bill of exceptions purports to be a narrative of "the proceedings had and done" in respect to the motion in question and to contain all the papers relative thereto; and it is settled and certified, by the judge who made the order, as "in all respects a true and correct record of the proceedings had and done in the above-entitled action." While this cannot be acclaimed as a model of precision, it would be refinement of technicality for us to say that we do not have a copy of the papers used on the hearing in the court below. (Rev. Codes, sec. 7113.)

Accepting the record, then, we find but two suggested grounds on which the district court could possibly have acted, *viz.*: (a) As a matter of discretion, upon a showing of excusable neglect upon the part of respondents, coupled with the existence of a meritorious defense; and (b) as a matter of law, on the theory that the judgment was void because the amended complaint was [3] fatally defective, or because the default was prematurely entered. There was no showing whatever of excusable neglect

or of the existence of any meritorious defense. It must therefore be assumed that the order was not made on discretionary grounds. Nor is there any substance in the contention that the amended complaint is essentially defective. It not only states one but seventeen causes of action. If, therefore, the ruling can be upheld, it must be upon the legal ground that the default and judgment were void as premature. (*State ex rel. Hickey v. District Court*, 42 Mont. 496, Ann. Cas. 1912B, 246, 113 Pac. 472.) Whether the default and judgment were premature depends upon when the amended complaint was served, and when [4] that occurred is a matter of evidence, as presented by the affidavits of Mr. Blaisdell for appellant and Mr. Schultz for respondents. Mr. Blaisdell avers that on September 12, 1913, he deposited a copy of the amended complaint in the United States postoffice at Plains, postpaid, and addressed to counsel for respondents, who lived at Thompson, which is twenty-five miles away. Assuming this to be correct, and allowing one day for the distance between points (Rev. Codes, secs. 7147, 7148), the respondents' time for answer expired on October 3. But Mr. Blaisdell's affidavit was not made until October 4, the day default was entered, and twenty-one days after the alleged deposit. In the absence of circumstances showing the contrary, it is inferable at least that his statement was to some extent a matter of recollection, and therefore not necessarily exact. From the affidavit of Mr. Schultz, on the other hand, certain inferences are permissible, viz., that there was in September, 1913, a regular and due course of mail between Plains and Thompson through and by means of at least two trains per day; that the amended complaint came to him in the course of such mail addressed to "H. G. Schultz and Gerard Young, attorneys, Thompson Falls, Mont."; that the same was delivered to him on the evening of September 14, 1913; that a letter mailed at Plains before the departure of either mail-carrying train would in the due course of mail arrive at Thompson on the same day; and that said amended complaint was not mailed from Plains until September 14 or until September 13 after all mail-carrying trains

had departed. If this be accepted, the respondents' time for answer did not expire until October 4, and the default was premature. It is not for us to say which of these affiants was correct; but it was the function of the presiding judge to choose between their respective representations, and, as it was possible for him to choose the one which would enable the respondents to defend the action, we are not disposed to overrule him.

The order appealed from is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

COMERFORD, ADMX., RESPONDENT, v. JAMES KENNEDY CONSTRUCTION CO., APPELLANT.

(No. 3,453.)

(Submitted January 7, 1915. Decided January 21, 1915.)

[145 Pac. 952.]

Personal Injuries—Master and Servant—Contributory Negligence—Evidence—Burden of Proof.

Personal Injuries—Master and Servant—Contributory Negligence—Evidence—Insufficiency.

1. Evidence in an action to recover damages for the death of a laborer killed by the caving in of a trench, *held* not to show contributory negligence on the part of deceased so clearly as to show that, in returning a general verdict in favor of plaintiff, the jury must have acted arbitrarily, justifying a reversal of the judgment.

[As to duty of master to servant, see note in 75 Am. St. Rep. 591.]

Same—Contributory Negligence—Burden of Proof.

2. The burden of proving that a servant's negligence contributed to his injury is upon the master.

[As to forgetfulness of known dangers as contributory negligence, see note in Ann. Cas. 1913B, 1197.]

Appeal from District Court, Missoula County; A. L. Duncan, Judge.

ACTION by Agnes M. Comerford, as administratrix of the estate of Thomas Comerford, deceased, against the James Ken-

nedy Construction Company and another. From a judgment for the plaintiff and an order denying it a new trial, the defendant company appeals. Affirmed.

Cause submitted on briefs of counsel.

Messrs. Woody & Woody, for Appellant.

The jury in considering of their verdict evidently disregarded the testimony of the witnesses Gustafson and Murtz. If they did consider it, they arbitrarily without any right, reason or authority disregarded it, and in support of this proposition we cite the case of *Boe v. Lynch*, 20 Mont. 80. Also *Lomer v. Meeker*, 25 N. Y. 363, where the court said: "The positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by the court or jury arbitrarily or capriciously. They are bound to believe for judicial purposes such testimony, and it would, in an instance like this, be the clear duty of the court to set aside the verdict of a jury founded upon a disbelief of a clear, uncontradicted and undisputed evidence." (See, also, *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140; *Engmann v. Estate of Immel*, 59 Wis. 249, 18 N. W. 182; *Edler v. Uchtmann*, 10 Ill. App. 493; *St. Louis etc. R. Co. v. Ramsey*, 96 Ark. 37, Ann. Cas. 1912B, 383, 131 S. W. 44; *Haddox v. Northern Pac. Ry. Co.*, 43 Mont. 8, 113 Pac. 1119.) "The record in this case shows no conflict in the testimony; nor do we find anything from which the jury were authorized to disbelieve the undisputed testimony offered in plaintiff's behalf. For this reason the judgment is reversed, and cause remanded for a new trial." (*Boe v. Lynch*, *supra*.)

The uncontradicted evidence on the part of appellant showed that Comerford was guilty of contributory negligence which was a proximate cause of the injury resulting in his death, and was ample and sufficient to sustain a verdict for the appellant, but the jury returned a verdict for the respondent, finding that the deceased was not guilty of any act of contributory negligence, which was a verdict with no evidence to sustain it, and for that

reason the verdict should have been set aside and a new trial granted, but this the lower court refused to do, and denied and overruled appellant's motion for a new trial, and in doing this the court erred. (*Nicholas v. Peck*, 20 R. I. 534, 40 Atl. 418, 21 R. I. 404, 43 Atl. 1038.)

Messrs. Hall & Whitlock, Mr. Jas. L. Wallace and Mr. Chas. N. Madeen, for Respondent.

Contributory negligence is an affirmative defense, and the burden of proving it is upon the defendant. It is equally well established that it is always a question for the jury when the evidence is conflicting or when reasonable men might differ as to the inferences which ought to be drawn from the undisputed evidence. In support of the first proposition, see *Prosser v. Montana C. Ry. Co.*, 17 Mont. 372, 30 L. R. A. 814, 43 Pac. 81; *Harrington v. Butte etc. Ry. Co.*, 37 Mont. 169, 16 L. R. A. (n. s.) 395, 95 Pac. 8; *Meehan v. Great Northern Ry. Co.*, 43 Mont. 72, 114 Pac. 781; *Melzner v. Raven Copper Co.*, 47 Mont. 351, 132 Pac. 552. The same rule prevails in practically every jurisdiction. Our own court has also spoken a number of times with reference to the second proposition, and the following cases show the attitude of the court upon that point: *Prosser v. Montana C. Ry. Co.*, 17 Mont. 372, 30 L. R. A. 814, 43 Pac. 81; *Knuckey v. Butte Electric R. Co.*, 45 Mont. 106, 112, 122 Pac. 280; *Nilson v. Kalispell*, 47 Mont. 416, 132 Pac. 1133. The rule in the *Prosser Case* has never been departed from, and the holding in the *Flaherty Case*, 42 Mont. 89, cited by appellant, does not in any measure contradict this general rule. For other cases holding with our own court, see *Jackson v. Grand Forks*, 24 N. D. 601, 45 L. R. A. (n. s.) 75, 140 N. W. 718; *Jevons v. Union Pac. Ry. Co.*, 70 Kan. 491, 78 Pac. 817; *Smith v. Occidental etc. Steamship Co.*, 99 Cal. 462, 34 Pac. 84; *Dunlap v. Northeastern R. R. Co.*, 130 U. S. 649, 32 L. Ed. 1058, 9 Sup. Ct. Rep. 647. Our court further holds that where contributory negligence is a question for the jury, their finding with reference thereto is conclusive, especially where a motion for a new trial has been

overruled, as in this case. (*Lehane v. Butte Electric Ry. Co.*, 37 Mont. 564, 97 Pac. 1038; *Flavin v. Chicago etc. R. R. Co.*, 43 Mont. 220, 115 Pac. 667; *Nilson v. Kalispell*, 47 Mont. 416, 132 Pac. 1133.)

We further submit that the mere fact that the testimony of certain witnesses may not be contradicted by other oral testimony does not by any means show conclusively that such testimony is true. The circumstances in the case, the physical conditions, the mode of testifying and the demeanor of the witnesses on the stand are to be considered by the jury in determining the credibility of the witnesses and the weight to be given their testimony. (*Whalen v. Harrison*, 26 Mont. 316, 67 Pac. 934; *Emerson v. Butte E. Ry. Co.*, 46 Mont. 454, 129 Pac. 319; *State v. Willette*, 46 Mont. 326, 127 Pac. 1013; *Raiche v. Morrison*, 47 Mont. 127, 130 Pac. 1074; *State v. Jones*, 48 Mont. 505, 139 Pac. 441.) The testimony may be discredited by the inherent improbabilities thereof or it may be inconsistent with the surrounding facts. (*In re Leslie*, 119 Fed. 406; *Phoenix etc. Ins. Co. v. Oppen*, 75 Conn. 295, 53 Atl. 586; *Bradley v. Gorham*, 77 Conn. 211, 66 L. R. A. 934, 58 Atl. 698; *Gannon v. Laclede Gaslight Co.*, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907; *Wilson v. Commercial Union Ins. Co.*, 15 S. D. 322, 89 N. W. 649; *Jevons v. Union Pac. Ry. Co.*, 70 Kan. 491, 78 Pac. 817; *Mee v. Carlson*, 22 S. D. 365, 29 L. R. A. (n. s.) 351, 117 N. W. 1033.) Another matter which may affect the weight to be given the testimony is the interest of the witnesses, and, in this connection, the jury may take into consideration the fact that a witness was an employee of defendant. (*Central of Georgia R. R. Co. v. Bagley*, 121 Ga. 781, 49 S. E. 780; *Hugumin v. Hinds*, 97 Mo. App. 346, 71 S. W. 479; *Tennessee Coal & Iron Co. v. Haley*, 85 Fed. 534, 29 C. C. A. 328; *Gorman v. Williams*, 26 Misc. Rep. 776, 56 N. Y. Supp. 1031; *Anderson v. Standard Gaslight Co.*, 17 Misc. Rep. 645, 40 N. Y. Supp. 671.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought to recover damages for the death of Thomas Comerford, caused by the alleged wrongful acts of the city of Missoula and the James Kennedy Construction Company, committed in the course of installing a public sewer. Comerford was a laborer employed by the construction company in excavating a trench for the sewer-pipe, and while so engaged was killed by a cave of the trench. The defense was a denial of negligence and a plea of contributory negligence on the part of the deceased. The trial resulted in a general verdict against the construction company, and it has appealed from the judgment and from an order denying its motion for a new trial.

There is not any difference of opinion as to the rules of law governing this case, but appellant insists that the verdict is [1] contrary to the evidence offered in support of the plea of contributory negligence, and conflicts with certain instructions given by the trial court. Whether either of these contentions should prevail depends altogether upon the consideration of that evidence.

According to counsel for appellant, but two witnesses, John Gustafson and John Murtz, gave testimony tending to disclose negligence on the part of Comerford which contributed to his death; but that evidence is to be viewed in the light of the further testimony that the deceased was a practical miner of some experience in that occupation.

The testimony of Gustafson may be summarized as follows: He was foreman of the construction company, in charge of the men at the time of the cave which caused the death, and was upon the surface some ten feet east of Comerford, who was facing east, shoveling dirt into a bucket at the bottom of the sewer trench, which was seventeen or eighteen feet deep. The trench was shored with sheathing placed perpendicularly with three or four sets of heavy stringers, placed transversely, and these kept in place by screw-jacks. From four to six feet west of Comerford, with his face to the west, was Murtz, laying the

sewer-pipe, and west of him was a helper. About 2:30 o'clock on the afternoon of September 24, 1910, while Gustafson was overseeing the work, he noticed the sheathing "going down," and, surmising a cave, called to the men, "Come up, boys; the sheathing is giving way," or words to that effect, and this was repeated immediately, but he did not have time to call again. At this warning Murtz also called to Comerford to get out, and Murtz and the helper went to the west and escaped. "Comerford stood and looked up, but did not make any attempt to move away." When the timbers started to give they moved slowly. It was three or four minutes between the time the first warning was given and the cave occurred. By going to the east four, six, or ten feet past his bucket and under the lowest screw-jack, which was two or three feet above the bottom of the trench, or between that jack and the one, two or three feet above it, Comerford could have reached a place of safety. The witness further testified: "I think he could have seen the wall moving." The body of Comerford was held down in the trench by a piece of one stringer broken by the cave.

In the main, the testimony of Murtz is corroborative of that of Gustafson. He testified, however, that the warning given by the foreman was "loud enough so we all heard it." And again: "As soon as he said 'Get out!' I left my shovel on top of the pipe and ran back west. I did not run; I walked—walked as fast as I could. I was scared when the foreman told us to get out of there, because the bank was cracking, I had to get out. I left my shovel down and walked as fast as I could ten feet, and then the crash came. Comerford did not say anything to me when I told him to get out. He looked up. * * * I could not see that the bank was cracking, then, nor could I see the sheathing move. It was not bellied; there were no indications as far as I could tell that anything was wrong."

It is now urged upon us that this evidence was uncontradicted; that it established the defense of contributory negligence, and in returning a general verdict for plaintiff the jury must have disregarded it arbitrarily. Upon the assumption that Gus-

tafson and Murtz were credible witnesses, and their testimony should be accepted as true, and the further assumption that Comerford heard and understood the warning in time to escape, an inference of contributory negligence might well be drawn, but the burden of proving contributory negligence was upon [2] the defendant, and if upon the evidence as a whole the jury were justified in discrediting these witnesses or in drawing an inference favorable to the deceased with respect to the care exercised by him, or if they were unable to say that the evidence preponderated in favor of the claim that his own negligence proximately contributed to his death, then the finding of the jury must be accepted by this court after it has been reviewed and approved by the trial court upon the motion for a new trial. Doubtless the jurors, viewing the conflicting statements of Gustafson and Murtz with reference to the period of time which elapsed between the warning and the catastrophe in the light of common experience, concluded that Murtz was much more nearly correct in his estimate, and that three or four seconds probably elapsed, rather than three or four minutes.

The testimony of Gustafson discloses that at the time of the cave, the contractors had cross-ties laid over the sewer trench to which rails were attached, and on this track a combination tram and hoist was running back and forth, lowering and raising the buckets in the trench and disposing of the dirt taken therefrom. The trial court by instruction 27 directed the jury that it was not enough that the warning was given in time for Comerford to escape, but that it must have been given loudly and distinctly enough to be heard and understood by a person of ordinary hearing at the place where decedent was working. By instruction 20 the court declared that a presumption, which had the effect of evidence, existed in favor of the deceased that he exercised due care for his own life and safety; such care as a person of his age, ability, capacity and experience ordinarily exercises. Viewed in the light of that presumption, and of the evidence that Comerford was a miner of experience, and of the circumstances surrounding him, his position in the trench seven-

teen or eighteen feet deep, with the noise of the tram overhead, and in the absence of any direct evidence that he heard the warning or understood its meaning, or saw the threatening danger, the jury might well have concluded from the entire case-made that he did not hear Gustafson, or, if he heard the call, that he did not understand it to be a warning, and that the circumstances were not such that he ought to have heard and understood.

This construction of the evidence disposes of the contention that the verdict is against the law as declared by the court in its instructions.

There are, however, facts and circumstances disclosed by the record which might well have prompted the jury to discredit the testimony of Gustafson and Murtz, but, in view of our conclusion above, these need not be considered.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

BUSBEE, RESPONDENT, v. GAGNON CO., APPELLANT.

(No. 3,449.)

(Submitted January 6, 1915. Decided January 23, 1915.)

[146 Pac. 275.]

Contracts—Breach—Sales—Personal Property—Warranty—Mitigation of Damages—Nominal Damages—New Trial—Counterclaim—Splitting Causes of Action—Witness—Credibility.

New Trial—Nominal Damages.

1. A new trial may not be granted merely for the purpose of allowing a party to recover nominal damages.

Contracts—Breach—Nominal Damages—New Trial.

2. In an action against a builder for breach of a contract calling for the delivery of a certain number of brick at a given time, evidence in support of a counterclaim for damages because of plaintiff's omis-

sion to deliver a sufficient number to keep the work going, held to justify recovery of no more than a nominal sum, failure to award which did not warrant the granting of a new trial, under the rule above.

[As to measure of damages for defective work under a building contract, see note in Ann. Cas. 1913B, 781.]

Same—Mitigation of Damages—Duty of Plaintiff.

3. One claiming to have been damaged by breach of a contract is bound to take measures, if reasonably possible, to mitigate the resulting injury.

[As to admissibility in evidence of matters occurring after beginning of action in reduction of damages, see note in Ann. Cas. 1914A, 1037.]

Same—Counterclaims—Splitting Causes of Action—Effect.

4. Where defendant, instead of including in one counterclaim damages which were one of the natural consequences of delay resulting from plaintiff's failure to deliver brick as required, split his cause of action into two counterclaims and recovered on the first, he was not entitled to even nominal damages on the second.

Same—Sales—Personal Property—Warranty—Remedies.

5. One who purchases articles for a particular purpose need not rescind the contract and restore them to the seller upon discovering a breach of the implied warranty (Rev. Codes, sec. 5110), but may set up his claim for damages by way of counterclaim in an action by the plaintiff for the purchase price.

Same—Breach—Witnesses—Credibility.

6. Where defendant contractor promptly paid for all brick delivered and used them in the construction of a building, without complaint that they were not of suitable quality, the court did not abuse its discretion in disregarding his testimony in support of his counterclaim based on their alleged unfitness for use in the walls of a building.

[As to credibility of witnesses, see note in 86 Am. Dec. 398.]

Appeal from District Court, Granite County; Geo. B. Winston, Judge.

ACTION by L. M. Busbee against the Gagnon Company. Judgment for the plaintiff, and defendant appeals from it and an order denying its motion for a new trial. **Affirmed.**

Mr. D. M. Durfee and *Mr. W. E. Moore*, for Appellant, submitted a brief, and argued the cause orally.

Where delay has been caused by breach of contract, the party injured has a right to recover from the person committing the breach all extra cost and expense to which he has been put by reason of such breach of the contract. (*McKenzie v. Mitchell*, 123 Ga. 72, 51 S. E. 34; *National Surety Co. v. Thompson Brick*

& Contracting Co., 176 Ill. 156, 52 N. E. 938; *Rollins v. Claybrook*, 22 Mo. 405; *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474; *Waco Artesian Water Co. v. Cauble*, 19 Tex. Civ. App. 417, 47 S. W. 538; *Citizens' El. L. & P. Co. v. Gonzales W. P. Co.* (Tex. Civ. App.), 76 S. W. 577; *Shurter v. Butler*, 43 Tex. Civ. App. 353, 94 S. W. 1084.) Inability to perform a contract is no defense to an action brought to fulfill, unless the inability amounts to an impossibility. (*Bates Machinery Co. v. Morton I. Works*, 113 Ky. 372, 68 S. W. 423; *Sweitzer v. Pinconning Co.*, 59 Mich. 488, 26 N. W. 762.) "A party must show performance on his part of a contract before he can compel other parties to perform it." (*Meyer v. Christopher*, 176 Mo. 580, 75 S. W. 750; *Downey v. Burke*, 23 Mo. 228; *Hall v. Little*, 85 N. Y. Supp. 653, 89 App. Div. 524.)

Where time is considered to be of the essence of a contract, it need not be stated in the words of the statute, but if it can be seen from the terms of the contract itself that time is of the essence of the contract, the provisions of the statute have been complied with. (*Miller v. Cox*, 96 Cal. 339, 31 Pac. 161.) "No particular form of stipulation is necessary to make time the essence of the contract. Any clause will carry that effect which clearly provides that the contract is to be void if fulfillment is not within a prescribed time." (*Martin v. Morgan*, 87 Cal. 203, 22 Am. St. Rep. 240, 25 Pac. 350.)

In *Brown v. Sayles*, 27 Vt. 227, it is said: "In a contract to manufacture an article at a fixed price there is an implied warranty that it should be of a medium quality of its kind." (See, also, *Snyder v. Holt Mfg. Co.*, 134 Cal. 324, 66 Pac. 311; *Fisk v. Tank*, 12 Wis. 276, 78 Am. Dec. 737; *Bobrick Chemical Co. v. Prest-O-Lite Co.*, 160 Cal. 209, 116 Pac. 747; *Miller & Co. v. Moore etc. Co.*, 83 Ga. 684, 20 Am. St. Rep. 329, 6 L. R. A. 374, 10 S. E. 360; *Fox v. Stockton etc. Co.*, 83 Cal. 333, 23 Pac. 295.)

Was there a waiver by the defendant on either of the two provisions of the contract, that is, the provision requiring bricks to be delivered "in sufficient quantities to keep the work going." as well as the implied provision that the brick delivered should

be suitable for the purpose for which they were intended? Authorities, almost without exception, are to the effect that where a person has contracted with a manufacturer to furnish material for a specific purpose, the acceptance of material not of a quality required for that purpose is not a waiver of the implied warranty that it was to be up to a certain standard. (*Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Bushman v. Taylor*, 2 Ind. App. 12, 50 Am. St. Rep. 229, 28 N. E. 97.) It is especially held to be the rule where the contractor has given a bond to fulfill his contract within a certain specified time, as was done by the defendant in this case. (*Ketchum v. Wells*, 19 Wis. 25; *Cox v. Long*, 69 N. C. 7; *Smith v. Brady*, *supra*.)

It was argued in the case in the court below that a payment of the part of the purchase price of the brick was a waiver of any defect in the material. In *Weeks v. Rector etc.*, 67 N. Y. Supp. 670, 56 App. Div. 195, it was held that: "Where a contractor has sustained damages by reason of a delay in the prosecution of his work caused by the owner, his receipt of the stipulated contract price is not a waiver of his right to proceed against such owner for the damages sustained by the violation of the agreement." (See, also, *Webber v. Mapes*, 98 App. Div. 165, 90 N. Y. Supp. 225; *Uhler v. Sanderson*, 38 Pa. 128; *Franklyn v. Schultz*, 23 Mont. 165, 57 Pac. 1037; *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104.)

Mr. Wingfield L. Brown, for Respondent, submitted a brief and argued the cause orally.

"Time is never considered as of the essence of a contract unless by its terms expressly so provided." (Rev. Codes, sec. 5047; *Snyder v. Stribling*, 18 Okl. 168, 89 Pac. 233; *Puls v. Casey*, 18 Okl. 142, 92 Pac. 388; *Merk v. Bowery Min. Co.*, 31 Mont. 298, 78 Pac. 524.) The California authorities cited by counsel for the appellant are not in point, for the reason that California has no Code provision similar to the section of the Montana Code above quoted. (2 Kerr's Cyc. Codes of Cal., p. 1401.) *Miller v. Cox*, 96 Cal. 339, 31 Pac. 161, construed

section 1492 of the California Code, a section similar to section 4936 of the Revised Codes, and has no application whatever to the point discussed here.

"A buyer of personalty cannot, after acceptance without protest, and in the absence of fraud or breach of warranty, claim that the goods were damaged when delivered." (*Talbot Paving Co. v. Gorman*, 103 Mich. 403, 27 L. R. A. 97, 61 N. W. 655; *Browning v. McNear*, 145 Cal. 272, 78 Pac. 722; *Studer v. Bleistein*, 115 N. Y. 316, 5 L. R. A. 702, 22 N. E. 243; *Jones v. McEwan*, 91 Ky. 373, 12 L. R. A. 399, 16 S. W. 81; *Müller & Co. v. Moore etc. Co.*, 83 Ga. 684, 20 Am. St. Rep. 329, 6 L. R. A. 384, 10 S. E. 360; 24 Am. & Eng. Ency. of Law, 2d ed., 1092.)

The alleged damage set out in defendant's third defense and counterclaim was too uncertain, remote and contingent; they do not arise from the natural course of things from the breach itself, or are such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach. (13 Cyc. 33, 35; *Sherman Center Town Co. v. Leonard*, 46 Kan. 354, 26 Am. St. Rep. 101, 26 Pac. 717; *Friend & Terry L. Co. v. Müller*, 67 Cal. 464, 8 Pac. 40; *Plymouth Gold Min. Co. v. United States Fid. Co.*, 35 Mont. 30, 10 Ann. Cas. 951, 88 Pac. 565; 8 Am. & Eng. Ency. of Law, 2d ed., 608-612, and notes.)

That part payment with full knowledge of the facts tends to prove a waiver of any defects in the performance, the authorities are all agreed. (*Lackman v. Simpson*, 46 Mont. 518, 29 Pac. 325; citing *Johnson v. Gallatin Val. M. Co.*, 38 Mont. 83, 98 Pac. 883; *Monroe Water Works v. City of Monroe*, 110 Wis. 11, 85 N. W. 685; *Katz v. Bedford*, 77 Cal. 319, 1 L. R. A. 826, 19 Pac. 523; *California So. H. Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; *Phillips & Colby Con. Co. v. Seymour*, 91 U. S. 646, 23 L. Ed. 341; *Morehouse v. Comstock*, 42 Wis. 626; *Dounce v. Dow*, 64 N. Y. 411.) The evidence of acceptance and waiver in the *Lackman Case*, *supra*, is no stronger, if as convincing, than the facts in this. The court there held that such evidence was sufficient to go to a jury

on the above points. In this case it was equally necessary and proper that the court should consider the facts in arriving at a judgment. (*Reed v. Randall*, 29 N. Y. 358, 86 Am. Dec. 305, 312; *Prickett v. McFadden*, 8 Ill. App. 197; *Barton v. Kane*, 17 Wis. 38, 84 Am. Dec. 728; *Thompson v. Libby*, 35 Minn. 443, 29 N. W. 150; *J. Thompson Mfg. Co. v. Gunderson*, 106 Wis. 449, 49 L. R. A. 862, 82 N. W. 299.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover a judgment for damages for breach of a contract. On May 12, 1912, the defendant having theretofore secured a contract for the erection of a courthouse for Granite county, the plaintiff entered into a contract with it to manufacture and deliver to it at the courthouse site "400,000 brick or more," as required by the defendant, at an agreed price of \$10.50 per thousand. The defendant was to notify the plaintiff of the approximate number required, "not later than the time for the burning of the last kiln." It was stipulated that the plaintiff should "commence delivering the brick not later than July 1 in sufficient quantities to keep the work going," but that a delay not to exceed a week later than that date, resulting from bad weather or other unavoidable cause stopping the work of brickmaking, the plaintiff using due diligence, should not be deemed a violation of the contract. On the 10th day of each month the plaintiff was to receive payment in full, at the stipulated price, for all brick delivered during the previous month. As a ground for recovery it is alleged, in substance, that the plaintiff between July 1 and September 15, 1912, manufactured 400,000 brick and delivered to the defendant according to the terms of the contract 313,622, for which he received the contract price per thousand; that he thereafter offered to deliver the balance of 86,378, in such numbers and at such times as the defendant might require, and demanded that the defendant inform the plaintiff as to the number required and the time of delivery; and that he was

informed by the agents of defendant that it would not accept further delivery from him. It is further alleged that the plaintiff has duly performed all the conditions of the contract to be performed by him; that he is ready and willing to deliver the balance due, and that by defendant's refusal to accept delivery thereof and pay the purchase price, he has been damaged in the sum of \$909. Defendant's answer, besides making denial of some of the allegations of the complaint presenting issues which it is not now necessary to notice, alleged the following counterclaims as defenses: (1) That the plaintiff violated the contract in failing to deliver brick during the month of July in quantities sufficient to keep the work going; that defendant was compelled to purchase brick elsewhere to the number of 36,000, at a cost of \$3 per thousand higher than the contract price; and that by reason of the premises the defendant was damaged in the sum of \$108. (2) That the plaintiff failed to deliver brick sufficient to keep the work going, whereby the defendant was compelled to lay off men and delay the work of erection for more than twenty days, at a cost of \$20 per day, thus suffering damage in the sum of \$400. And (3) that large numbers of the brick furnished by the plaintiff were unsuitable for use and unfit to be put into the walls of the building because they were broken into pieces at the time of delivery; that because of their broken condition the cost of laying the whole number delivered by plaintiff was \$1.50 per thousand over and above what the cost would have been had plaintiff delivered them in suitable condition; and that defendant thereby suffered damage in the sum of \$470.43. Judgment is demanded for these several amounts. Upon all of these defenses there was issue by reply. The court made findings in favor of plaintiff on all the issues, except those arising upon the first counterclaim. In this behalf it found that the defendant was entitled to a credit of the amount paid for the 36,000 brick at the price of \$13.50 per thousand, and that for the balance the plaintiff was entitled to recover at the price stipulated in the contract, less \$1.75 per thousand, the cost of hauling from the kiln to the courthouse

site. It ordered judgment for the plaintiff for the balance thus ascertained, amounting to \$332.80, together with costs of the action. The defendant has appealed from the judgment and the order denying its motion for a new trial.

That the findings and decision of the trial court upon the first counterclaim were correct is not now questioned. The only contention made is that the findings upon the issues relating to the second and third are not justified by the evidence. As to the second, the evidence discloses these facts: The plaintiff, having finished the burning of his first kiln containing 100,000 brick, began and continued deliveries until July 31, when delivery of the entire number of 100,000 was completed. The plaintiff was then engaged in burning a second kiln containing 200,000, having been delayed in completing it because of his inability to procure wood. On August 4, Mr. Hebb, the agent of defendant in charge of the construction work, was at the brickyards of plaintiff. Upon inquiry of plaintiff, he found that the burning would not be completed before August 12, and hence that the work of construction would be delayed until that time. Immediately thereafter he purchased 36,000 brick from a manufacturer in Missoula. There were then at the building site enough brick of those theretofore delivered by plaintiff to keep the work going for one more day. A part of those already delivered had been, by consent of defendant, diverted to a building in course of construction near by, by another contractor. Delivery of these was considered by defendant a delivery to it under the contract. It afterward paid for them. No complaint was made of the delay between August 4 and August 12, and as soon as the kiln was finished, and on August 12, plaintiff resumed and continued deliveries until the brickwork on the building was completed. Payments were punctually made by defendant as stipulated in the contract, without notice to plaintiff that he would be held accountable for his failure to deliver brick sufficient to keep the work going. As to these facts there is no controversy, except as to the extent of the delay. Mr. Hebb testified that the construction work was delayed, for want of

brick, from July 20 to August 12. While admitting that during July he diverted some brick to another building, he stated that the number was only 3,000. Plaintiff had fixed the number at 5,700. Mr. Suiter, another witness and an employee of defendant, said that the delay covered three or four weeks. Both stated, by way of conclusion, that the delay caused the defendant a daily loss of \$20. There was no evidence showing, or tending to show, that the defendant was compelled to lay off any men as alleged in the answer, or to retain any in idleness for any number of days or at all. Nor did it appear that the defendant had to pay the county a penalty for delay in the completion of the building. Neither of these witnesses—who were the only ones who testified on the subject—undertook to contradict the statement of the plaintiff as to what the condition of the supply of brick was on August 4, when the purchase was made at Missoula; nor is there any evidence tending to show that the bricklayers were not kept busily employed in laying these brick during every day from August 4 to August 12, when plaintiff resumed deliveries. In view of the admitted facts and the lack of definite statement by either witness justifying an inference that the defendant suffered damage, its claim for damages in a substantial amount was properly considered without foundation in the evidence. “No damages can be recovered for a breach of contract which are not clearly ascertainable, in both their nature and origin.” (Rev. Codes, sec. 6049.) Without regard to the apparent variance between the allegations of the defendant and the evidence as to the particular manner in which it suffered damage, the foregoing evidence does not, under the rule of the statute, justify any recovery other than the nominal damages which the law presumes as a result of plaintiff’s breach of the contract. (*Raiche v. Morrison*, 47 Mont. 127, 130 Pac. 1074.) By a purchase of brick from Missoula in order to avoid a stopping of the work, which defendant was bound to do, if reasonably possible (*Ashley v. Rocky Mt. Bell Tel. Co.*, 25 Mont. 286, 64 Pac. 765), it forestalled the proba-

ble consequences of the breach and reduced the damages to a nominal amount.

We are inclined to the opinion that the damages alleged on this counterclaim should properly have been included as an [4] item for which recovery could be had, if at all, under the first counterclaim. From this point of view they were one of the natural consequences of the delay which would have resulted but for the purchase of the supply of brick at Missoula. Upon this theory defendant was not entitled to recover even nominal damages, for the reason that he split his cause of action. (*Murray v. City of Butte*, 35 Mont. 161, 88 Pac. 789.) But upon the assumption that the matters alleged constituted an independent breach of the contract, and that defendant was entitled to recover nominal damages on account of it, the court did not commit reversible error in failing to award them. A recovery would not have carried costs in any event. Such being the case, a new trial may not be granted merely for the purpose of allowing the defendants to recover a nominal sum. (*Wallace v. Weaver*, 47 Mont. 437, 133 Pac. 1099.)

As to the third counterclaim, it is contended that since, under the statute (Rev. Codes, sec. 5110), the plaintiff must be pre-[5] sumed to have sold the brick to defendant with a warranty that they were reasonably fit and suitable for use in the building, and it appears without dispute that a large percentage of the entire lot were broken, thereby obliging defendant to incur additional expense in order to carry forward the work of construction, the court erred in refusing to find and assess substantial damages to the defendant in this behalf. As counsel contend, it was not controverted by direct statement of any witness that many of the brick were broken—a much larger percentage than is usually the result of handling and hauling common brick, such as were the subject of the contract. Nor did any witness contradict the statements of the witnesses Hebb and Suiter that the cost of laying the entire number delivered was increased to the extent of \$1.50 per thousand. It is not clear whether Mr. Hebb made complaint to the plaintiff as to

the condition of the brick. He testified that he protested to the teamsters who delivered the brick, at the manner in which they did the unloading from the wagons, and thought that at one time, when at plaintiff's brickyard, he had told plaintiff that the teamsters were delivering them in bad condition. The plaintiff denied emphatically that he had ever been spoken to on the subject by anyone, or had ever heard of any complaint. On the other hand, all brick delivered were promptly paid for as provided in the contract, without deduction or intimation that defendant would claim damages because of their condition. They were used in the construction of the building just as if they had been of suitable quality and in first-class condition. The rule is well established that, when one purchases articles under a warranty that they are reasonably suitable for the purpose for which they were purchased, he is not bound to rescind the contract and restore the articles upon discovering a breach of warranty, but may set up his claim for damages by way of counterclaim in an action by the plaintiff for the purchase price. (*Best Mfg. Co. v. Hutton*, 49 Mont. 78, 141 Pac. 653; *Hillman v. Luzon Café Co.*, 49 Mont. 180, 142 Pac. 641.) Nevertheless it is incumbent upon the claimant to establish both the breach and the resulting damages by a preponderance of the evidence. [6] The conduct of defendant's agents throughout the entire transaction was so entirely inconsistent with the claim now set up, that we think that the court was justified in rejecting the evidence adduced in support of it, and in finding that it was without foundation in fact. Evidently it concluded that witnesses whose testimony was pregnant with the admission that they had been guilty of using unfit material for the construction of a public building, thus defrauding the county, ought not to be regarded as trustworthy. We cannot say that it clearly abused its discretion in so doing.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

GRUELLE, APPELLANT, v. J. I. CASE THRESHING
MACHINE CO., RESPONDENT.

(No. 3,461.)

(Submitted January 9, 1915. Decided January 23, 1915.)

[146 Pac. 277.]

Master and Servant—Liability for Wages—Evidence—Insufficiency—New Trial.

1. *Held*, in an action to recover for labor done, that a new trial was properly granted defendant, where the evidence failed to disclose that he was the person at whose instance the services were performed by plaintiff.

[As to contracts for permanent employment, see note in 51 Am. St. Rep. 301.]

Appeal from District Court, Teton County; H. H. Ewing, Judge.

ACTION by Samuel Gruelle against the J. I. Case Threshing Machine Company. From an order granting a new trial, plaintiff appeals. Affirmed.

Mr. David J. Ryan, for Appellant, submitted a brief.

Mr. W. F. O'Leary and *Mr. Phil. I. Cole*, for Respondent, submitted a brief; *Mr. O'Leary* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action originated in the justice's court of Conrad township, Teton county. It was brought to recover the sum of \$54, alleged to be due the plaintiff for labor performed by him for the defendant in the operation of a threshing outfit during the month of October, 1912, and the sum of \$75, alleged to be due upon a claim for like services performed for the defendant by one Edwards and assigned by him to the plaintiff. The justice awarded plaintiff judgment for \$100, and the defendant appealed to the district court. A trial in that court resulted in

a verdict for plaintiff for the full amount of both claims. The cause is before this court on plaintiff's appeal from a general order granting defendant's motion for a new trial.

It is apparent from the record that the district court granted the order solely on the ground of insufficiency of the evidence. [1] A careful reading of the evidence has convinced us, not merely that the court was justified in granting the order, but that it would have committed error in refusing to do so. The theory of plaintiff was that the defendant was the owner of the threshing machine, and that the persons in charge of it, and at whose instance the services were performed, were defendant's agents. It appears, however, that the only connection defendant sustained to it was that it held a chattel mortgage upon it to secure the purchase price due from one La Breche, who had theretofore purchased it from the defendant, and that it was being operated solely for his benefit. Incidentally it appears that on October 25 the defendant took possession of the machine and thereafter became responsible for the wages of the employees; but it does not appear that any part of plaintiff's claim accrued after that date. Therefore the evidence does not fix liability upon the defendant for any portion of either of the claims.

The order is affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

JENDERSON, APPELLANT, v. HANSEN, RESPONDENT.

(No. 3,458.)

(Submitted January 8, 1915. Decided January 23, 1915.)

[146 Pac. 473.]

*Contracts of Sale—Payment on Delivery—Breach by Buyer—
Checks—Telephone Conversations—Evidence—Admissibility—
Cross-examination—Instructions—Assumption of Fact—
Proper Refusal.*

**Sales—Delivery and Payment Concurrent—Condition Precedent to Delivery—
Breach.**

1. Where delivery of a carload of oats and payment therefor were to be concurrent at shipping point, the buyer was required, in his action for breach of the contract of sale, to show an offer and ability to pay at that point.

[As to acceptance and delivery of goods which will satisfy sales, see notes in 49 Am. Dec. 325; 37 Am. Rep. 16; 96 Am. St. Rep. 215.]

Same—Checks—Evidence—Admissibility.

2. Plaintiff having alleged in his complaint that he had given to defendant a check as part payment to insure acceptance of the oats, evidence that upon inquiry of the bank upon which it was drawn, whether it was good, a negative answer was received, was properly admitted.

[As to presumption arising from delivery of bank check, see note in 1913D, 1203.]

Same—Checks—Proper Cross-examination.

3. Cross-examination of plaintiff, who had testified that he had given a check for \$100 in part payment, whether he had to exceed half that amount in the bank at that time, was proper.

Same—Checks—Telephone Conversations—Evidence—Admissibility.

4. Inquiry of the bank on which a buyer had given him a check, whether there were funds sufficient to meet it, could properly be made by the seller in person, or by telephone, or through another; hence evidence that the desired information was obtained through the medium of an employee of another bank by telephone was admissible.

Instructions—Assumption of Fact—Proper Refusal.

5. An instruction requested by plaintiff which assumes as a basis for the defense facts which were not supported by the evidence, was properly refused.

*Appeal from District Court, Powell County; Geo. B. Winston,
Judge.*

ACTION by R. E. Jenderson against R. E. Hansen. Judgment for the defendant, and plaintiff appeals from it and an order overruling his motion for a new trial. Affirmed.

Mr. T. F. Shea, for Appellant, submitted a brief and argued the cause orally.

Messrs. Scharnikow, Paul & Jordan, for Respondent, submitted a brief; *Mr. Jordan* argued the cause orally.

One of the requisites, on the part of a purchaser, for breach of contract, before bringing an action is that he must be able to perform the conditions, and especially the concurrent conditions to be performed by him. (Sec. 4903, Rev. Codes; *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 360, 101 Am. St. Rep. 569, 74 Pac. 938; *Granay v. McCleese*, 2 Jones (N. C.), 142, 64 Am. Dec. 576.)

Where nothing is said, and no time stipulated as to payment, the sale is understood to be for cash, and the payment and delivery are concurrent acts, and the vendor may refuse to deliver without payment. (*Offutt v. Wells*, 42 Ala. 199; *Cole v. Swans-ton*, 1 Cal. 51, 52 Am. Dec. 288; *Messenger v. Woge*, 20 Colo. App. 275, 78 Pac. 314; *Ainsworth v. Roush*, 109 Ill. App. 299; *Rous v. Walden*, 82 Ind. 238; *National Construction Co. v. Vulcanite P. C. Co.*, 192 Mass. 247, 78 N. E. 414; *Frazier v. Atchison, T. & S. F. Ry. Co.*, 104 Mo. App. 355, 78 S. W. 679; *Baker v. McDonald*, 74 Neb. 595, 1 L. R. A. (n. s.) 474; 104 N. W. 923; *Poliakoff v. Petry*, 99 N. Y. Supp. 481, 50 Misc. Rep. 602; *Howard v. Emerson* (Tex. Civ. App.), 65 S. W. 382; *Kitson Machine Co. v. Halden*, 74 Vt. 104, 52 Atl. 271; 35 Cyc. 262.) The promise to deliver, involved in an agreement of sale, and the promise to pay the purchase money, are mutually dependent. Neither party is bound to perform without contemporaneous performance by the other. Payment of the price is the condition upon which alone the purchaser can require the seller to complete the sale and delivery of the property. (*Lewis v. Craft*, 39 Or. 305, 64 Pac. 809.) So where a sale is made for payment on delivery, the delivery and payment are concurrent conditions, binding upon each party to the transaction, consisting of the obligation on the part of the seller to deliver and the buyer to pay. (*Porter v. Plymouth Gold Min. Co.*, 29

Mont. 360, 101 Am. St. Rep. 569, 74 Pac. 938; *Fishback v. Van Dusen*, 33 Minn. 111, 22 N. W. 244; *Cadwell v. Blake*, 6 Gray, 402; *Warren v. Wheeler*, 21 Me. 484; *Day v. Bassett*, 102 Mass. 445; *Phillips v. Williams*, 39 Ga. 597; *Hutchings v. Munger*, 41 N. Y. 155; *Williams v. Healey*, 3 Denio, 363.)

Where a witness testifies that he conversed with a certain person over the telephone, it clearly implies that he recognized the voice. (*Galt v. Woliver*, 103 Ill. App. 71; *State v. Usher*, 136 Iowa, 606, 111 N. W. 811; *Wolfe v. Missouri Pac. Ry. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 3 L. R. A. 539, 11 S. W. 49; *Oskamp v. Gadsden*, 35 Neb. 7, 37 Am. St. Rep. 428, 17 L. R. A. 440, 52 N. W. 718.) In *Godair v. Ham Nat. Bank*, 225 Ill. 572, 116 Am. St. Rep. 172, 8 Ann. Cas. 447, 80 N. E. 407, the court, after citing the case of *Wolfe v. Missouri Pac. Ry. Co.*, *supra*, said: "While the weight to be given to such a conversation is to be determined by the jury, we think the reasoning in the *Wolfe Case* satisfactory, and are of the opinion that the court did not err in admitting the evidence." (See, also, *Barratt v. Wagner*, 105 Minn. 118, 127 Am. St. Rep. 530, 117 N. W. 245.)

MR. JUSTICE SANNER delivered the opinion of the court.

Appeal by plaintiff from a judgment entered against him on a verdict of the jury, and from an order overruling his motion for new trial. His contentions are: That the verdict and judgment are not warranted by the evidence; that the court erred in certain rulings upon the exclusion and admission of testimony; that the court erred in refusing a certain offered instruction numbered 13.

The action is upon a contract entered into in February, 1912, incompletely evidenced by the following memorandum delivered to plaintiff by defendant: "This is to show that I have sold one car of oats to be loaded at Garrison at \$1.15 per hundred. R. E. Hansen." It was alleged by the plaintiff that he tendered defendant \$100 as part payment and has been at all times "ready, willing, and able to do and perform all things" required

of him by the contract, but that defendant refused to deliver the oats, notwithstanding demand, to the plaintiff's damage. The effect of the amended answer is to deny the tender of \$100 as part payment, the defendant's refusal to deliver, and the damages, and to allege that the oats were to be delivered at Garrison upon payment therefor at the price stated; that the defendant was ready at all times to deliver and offered to deliver the oats; that he frequently requested plaintiff to receive and pay for the same as agreed, but plaintiff failed and refused so to do. The reply admits that defendant frequently requested plaintiff to come and receive the oats and pay for the same.

1. There was ample evidence to sustain the defendant's contention that delivery and payment were to be concurrent, at Garrison; and this contention the jury necessarily upheld by their verdict. The plaintiff was therefore required to show an offer and ability to receive the oats and pay for them at Garrison. (Rev. Codes, sec. 4903; *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.) That he did not do this is clear from his own insistence that payment was to be made upon delivery to him at Butte, as well as from other circumstances disclosed in the record.

2. After the contract was entered into, and as part payment to insure the acceptance of the oats, plaintiff gave defendant [2, 3] a check for \$100 on the State Savings Bank of Butte. The defendant took the check to the Larabie Bank at Deer Lodge to ascertain through inquiry of the State Savings Bank whether it was good. The inquiry was conducted by Mr. Gullette, and the answer was that there were not sufficient funds to meet it. Error is assigned upon the admission of this evidence, and also because the court required the plaintiff on cross-examination to answer if he had to exceed \$50 in bank when the check was given. Whether the check was good or not was pertinent under the allegations of the complaint and upon the version of the contract sought to be maintained by the plaintiff. He had on his direct examination testified in

support of his version and to the giving of the check. This was sufficient to warrant the cross-examination complained of.

As to the inquiry, it could have been made of the State Savings Bank by the defendant in person. Of this there is not and cannot be any question. If he could make it in person he could make it by telephone. (*Barrett v. Magner*, 105 Minn. 118, 117 N. W. 245, 127 Am. St. Rep. 531, and note, p. 538 *et seq.*); and if he could make it directly he could make it through another.

3. Refusal of instruction No. 13 was entirely justified. It assumes a presentment of the check for payment at the Larabie Bank and refusal by that bank, as a basis for defendant's position. There was no such evidence and the defendant took no such position.

The judgment and order appealed from are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

BALL RANCH CO., RESPONDENT, v. HENDRICKSON ET AL.,
APPELLANTS.

(No. 3,451.)

(Submitted January 7, 1915. Decided January 30, 1915.)

[146 Pac. 278.]

Animals—Running at Large—Statutes—Negligence—Jury Question—Pleading and Proof—Liability of Wrongdoer—Measure of Damages.

Animals—Running at Large—Pleading and Proof.

1. In an action for damages claimed to have been caused by defendant's neglect of duty imposed by sections 1881 and 1883, Revised Codes, not to permit rams to run at large at certain seasons of the year, plaintiff must plead nonobservance of the statute and make a case bringing the defendant within the liability created thereby.

[As to liability of owners for damages resulting from animals, see note in 36 Am. St. Rep. 831.]

Same—Simple and Statutory Negligence—Liability.

2. Where simple negligence is relied on as a basis of recovery of damages caused by permitting animals of the character referred to above to run at large, the plaintiff must prove, by a preponderance of the evidence, the negligence alleged, the defendant being held to the exercise of ordinary care only; where, however, the damages are alleged to spring from noncompliance with the duty imposed by section 1881, Revised Codes, disobedience in this respect constitutes negligence *per se* and makes defendant liable, if the injury was proximately caused thereby.

[Liability for injuries by and to animals, see notes in 16 Am. St. Rep. 631; 36 Am. St. Rep. 831.]

Same.

3. *Held*, that where rams run at large without the tacit consent of the persons in control, or such persons make a reasonable effort to hinder or prevent them from running at large, no offense is committed, and no liability is incurred either under sections 1881-1883, Revised Codes, or in an action based upon simple negligence.

Same—Negligence—Jury Question.

4. Evidence reviewed and *held* to be insufficient to warrant the trial court in determining as a matter of law, and peremptorily instructing the jury, that defendants were guilty of negligence in permitting rams to stray away.

Same—Measure of Damages.

5. In an action for negligence, in permitting rams to stray away and to get into plaintiff's band of ewes, causing them to become pregnant and to lamb at a time of the year when it was impossible to keep either the ewes or the lambs, the measure of damages was the market value of the ewes at the time of the wrong, with interest from that time in the discretion of the jury; hence evidence of the value of the lambs which died was inadmissible.

Appeal from District Court, Custer County; Sydney Sanner, Judge.

ACTION by the Ball Ranch Company against Martin Hendrickson and another. Judgment for plaintiff, and defendants appeal from it and an order denying them a new trial. Reversed and remanded.

Messrs. Loud, Collins, Brown, Campbell & Wood, for Appellant, submitted a brief; *Mr. Chas. S. Loud* argued the cause orally.

The gist and substance of this action as disclosed by the allegations of the complaint is the injury inflicted upon the property of the respondent by the alleged negligence of the appellants. The damages, if any were sustained, were caused to the

ewes, and the proper element of damage would have been the value of the ewes before and after the injuries complained of. (*Stearns v. McGinty*, 55 Hun, 101, 8 N. Y. Supp. 216; *Crawford v. Williams*, 48 Iowa, 247.)

It is apparent from the pleadings and from the proof introduced in support thereof, that plaintiff could not have successfully maintained an action based on the provisions of sections 1881 and 1883, Revised Codes, upon the facts appearing in evidence. There is absolutely no proof in the record that these bucks were permitted to run at large or that they were running at large within the meaning of the statute. It has been held that animals which escape from an inclosure in which they have been placed for the purpose of confining them and which the owner when he learns of their escape endeavors to recover cannot be regarded as animals running at large within the meaning of the statutes. (*Stephenson v. Ferguson*, 4 Ind. App. 230, 30 N. E. 714; *Keeney v. Oregon R. & N. Co.*, 19 Or. 291, 24 Pac. 233.) And it was held by the Kansas supreme court in *Leavenworth T. & S. W. Ry. Co. v. Forbes*, 37 Kan. 445, 15 Pac. 595, that the fact that hogs are found at large in a township where they are prohibited by law from running at large, is not conclusive evidence that they are trespassers. It depends upon how they came to be at large. If by the deliberate or negligent acts of the owner, then they are to be considered as running at large; but if by accident without fault of the owner, then they are not running at large as contemplated by the law. To the same effect we cite: *Wolf v. Nicholson*, 1 Ind. App. 222, 27 N. E. 505; *McBride v. Hicklin*, 124 Ind. 499, 24 N. E. 755; *Rutter v. Henry*, 46 Ohio St. 272, 20 N. E. 334; *Briscoe v. Alfrey*, 61 Ark. 196, 54 Am. St. Rep. 203, 30 L. R. A. 607, 32 S. W. 505; *Thompson v. Corpstein*, 52 Cal. 653. The burden of proof is upon plaintiff in actions for negligence; the law will not presume it for him. (*McCully v. Clarke*, 40 Pa. 399, 80 Am. Dec. 584; *Horstick v. Dunkle*, 145 Pa. 220, 27 Am. St. Rep. 685, 23 Atl. 378; *Pennsylvania Canal Co. v. Bentley*, 66 Pa. 30.) The respondent in its complaint has alleged negligence on the part

of the appellants, their servants and agents, but has absolutely failed to introduce any proof whatsoever establishing or tending to establish any negligence in the handling of these bucks.

Mr. Geo. W. Farr and *Mr. H. E. Herrick*, for Respondent, submitted a brief; *Mr. Farr* argued the cause orally.

Plaintiff does not base its recovery upon the statutes. This action is for damages for negligence and breach of defendants' positive duty and obligation to keep their bucks from straying from their band, and their implied promise to pay any damages incurred.

Defendants cite some cases in support of the contention that the words "at large" do not have reference to an escape of animals from an inclosure or from restraint, but rather covers cases where animals are permitted to roam at will without an effort of restraint. We submit that the words "permit the same to run at large" as used in the statute mean stock not under control of the owner or under the care of a shepherd or herdsman whatever may have been the original cause for their being at large. In other words, it is immaterial that they may have been under restraint at one time; if they are running loose, not under control, they are at large. (*Hinman v. Chicago R. I. P. Ry. Co.*, 28 Iowa, 491; *Inman v. Chicago M. & St. P. R. Co.*, 60 Iowa, 459, 15 N. W. 286; *Hammond v. Chicago N. W. R. Co.*, 43 Iowa, 168; *Russell v. Cone*, 46 Vt. 600; *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496.)

Where a herd of cattle being herded by a boy were left by him while he returned to his father's house, about a half a mile distant, when another boy went to take charge of them, during his absence some of the cattle strayed away from the others, it was held that these cattle wandered at large during the interval between the first boy leaving them and the return of the second. (*Valleau v. Chicago M. & St. P. Ry.*, 73 Iowa, 723, 36 N. W. 760.) A colt that escaped from its owner while being conducted across depot grounds and strayed upon the track is regarded as "running at large" within the meaning of

the statute requiring railroad companies to fence against live-stock running at large. (*Smith v. Kansas City St. J. & B. R. Co.*, 58 Iowa, 622, 12 N. W. 619.)

We believe that under our statute any person who "permits," whether willfully, carelessly, negligently or otherwise, any ram which is running in a herd to become separated from the band and to roam at will over the range, is "permitting" the ram to run at large within the meaning of the statute.

Appellants did not offer any instructions on the question of damages or the measure thereof. The record is silent as to what, if any, instructions the defendants did offer; their offered instructions not being made a part of the record. Before they can complain of an instruction because not as specific as it should have been, it was their duty to offer one not containing that defect. (*Kirk v. Smith*, 48 Mont. 489, 138 Pac. 1088; *Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70; *Hollenback v. Stone & Webster E. Corp.*, 46 Mont. 559, 129 Pac. 1058.)

HON. JOHN B. McCLEARNAN, a Judge of the Second Judicial District, sitting in place of MR. JUSTICE SANNER, disqualified, delivered the opinion of the court.

This action was commenced by plaintiff and respondent to recover damages against the defendants and appellants for injuries to plaintiff by reason of the death of ewe sheep and lambs, alleged to have been caused by the negligence of the defendants. The charging part of the complaint, or as much thereof as is necessary for a proper understanding of the case, is as follows: "That on or about the 24th day of September, 1911, the defendants negligently and carelessly, through their agents, servants, and employees, permitted said buck sheep to stray away from the band and herd in which they theretofore had been kept, without anyone in charge or control of said buck sheep, and said buck sheep then got into the band of ewes belonging to the plaintiffs, covering and breeding a great number thereof, and as a result of which a great many of said ewe sheep, to-wit, about 260 head or more thereof, then became preg-

nant with lamb; that the causing of said ewe sheep to become pregnant with lamb at that season of the year caused great damage to said sheep and to the plaintiff, in that the ewe sheep were delivered of lambs at a time of the year when, in Montana, it was impossible to keep either the said ewes themselves or the lambs dropped by them alive"; and that all of said lambs and 200 head of mother ewes died in consequence thereof, all to plaintiff's damage in the sum of \$1,500. Defendants, by their answer, denied, among other things, all allegations of negligence and damage, and alleged, affirmatively, contributory negligence on the part of plaintiff. All affirmative matter was replied to. The action was tried by court and jury, and a verdict found and returned for plaintiff for the sum of \$800, upon which verdict judgment was duly entered. This is an appeal from the judgment and from an order denying defendants a new trial. The defendants at the trial introduced no evidence, but presented motions for nonsuit and directed verdict, which were denied.

Counsel for respondent in their brief say: "Plaintiff does not base its recovery upon the statutes. This action is for damages for negligence and breach of defendants' positive duty and obligation to keep their bucks from straying from their band, and their implied promise to pay any damages incurred." It will be noticed, also, that no attempt has been made to bring the action within the provisions of either section 1881 or 1883 of the Revised Codes.

"In an action for the neglect of a statutory duty, the plaintiff [1, 2] must allege that the defendant neglected a duty imposed by statute," *etc.* He must make a case bringing the defendant within the liability created by the statute, and the proof must conform to the pleading. (Ency. of Pl. & Pr., p. 336, treating the subject of Negligence.) It is necessary to bear this in mind in considering questions hereinafter treated, especially some instructions of the court complained of by appellants. For, if this case is treated as one of simple negligence, then it will be controlled by rules generally governing in such cases; that is, the plaintiff must prove, by a preponderance of the evi-

dence, the negligence alleged, and the defendants would be held to the exercise of ordinary care only. If, however, the plaintiff can avail itself of the statutes, under the pleadings and evidence in this case, then a different rule prevails. "The necessity for his compliance with the command of the legislature becomes imperative, and any failure on his part to observe the required precautions * * * is such a breach of duty as will render him liable for any injury caused by his disobedience." (*Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243.) This court, in the same case (*Monson v. La France Copper Co.*, *supra*), cited, with evident approval, Mr. Labatt in his work on Master and Servant, in which he says, after referring to the fact that many courts hold such disobedience negligence *per se*, while others hold it to be merely evidence of culpability: "That the former of these theories is the correct one can scarcely be doubted. A doctrine, the essential effect of which is that the quality of an act which the legislature has prescribed or forbidden becomes an open question upon which juries are entitled to express an opinion, would seem to be highly anomalous. The command or prohibition of a permanent body which represents an entire community ought in any reasonable view be regarded as equivalent to a final judgment upon the subject matter, which renders it both unnecessary and improper that this question should be submitted to a jury."

But, before these rules can be applied, it must be shown that the defendant was guilty of some violation or disobedience of the provisions, or some provision, of the statute invoked, and that the injury was proximately caused by such violation or disobedience. (*Monson v. La France Copper Co.*, *supra*, and cases there cited.) Some stress is laid on this feature of the case because counsel for respondent evidently attempt to invoke the provisions of section 1881 of the Revised Codes in justification of the instructions referred to, notwithstanding the condition of the pleadings and the evidence and their own admissions hereinbefore referred to.

The first error complained of by appellants which we shall notice, because we consider it the most serious question in the case, is the giving of two certain instructions, as follows, to-wit:

Instruction No. 3: "The jury is instructed that a person having the possession and control of a band of buck sheep are presumed to keep all of the buck sheep together in the band or under control, and, if any of the buck sheep get out of the band and stray away and get with ewe sheep, it is then presumed that the persons in charge of the buck band carelessly and negligently permitted them to get away, and the duty devolves upon such persons to produce evidence tending to show that there was no such negligence."

Instruction No. 4: "The jury are instructed that the defendants in their answer having admitted the escape of 84 head of buck sheep from the buck band in their control, and the mixing of said bucks with plaintiff's ewe sheep, it became the duty of the defendants to present evidence tending to show that the escape of said bucks was without their fault or negligence, and, not having offered any such kind of testimony, such fault or negligence will be presumed, and your verdict will be for the plaintiff for such damages as you find that it has sustained in consequence thereof."

The instructions are in effect peremptory instructions to find for plaintiff. Upon what theory they were given we are not [3] informed. If upon the theory that negligence *per se* had been shown by reason of a violation of the provisions of section 1881, *supra*, then we must say that the pleadings, evidence, and admissions of counsel do not justify them.

In view of the pleadings, evidence and admissions referred to, this feature of the case might, with propriety, we think, be passed without further notice; but, as counsel on both sides have argued at length concerning that feature, it might be well for this court at this time to give expression to its views concerning section 1881, *supra*, and its applicability to the present case. We have already said the plaintiff is in no position to take advantage of its provisions for the purpose of invoking rules of law

which only apply in case of violation of those provisions, if properly pleaded and proved.

Section 1881 is as follows: "It is unlawful for any owner or person having the management or control of any ram or he-goat to permit the same to run at large between the first day of August and the first day of December of each year." Section 1882 provides a penalty for violation of the provisions of section 1881. To permit the ram or he-goat to run at large constitutes the offense under the statute, and not alone the running at large. The chief difficulty encountered in construing the statute seems to be in determining the proper definition of the word "permit," as used therein. "The language [of a statute] is to be understood in its usual and ordinary significance." (*Osterholm v. Boston & Mont. C. C. & S. Min. Co.*, 40 Mont. 508, 528, 107 Pac. 499, 505.) Webster's definition of the word "permit" is: "To allow by tacit consent, or by not hindering; take no steps to prevent; consent tacitly to." Other judicial definitions to the same effect can be found in Words and Phrases, some of which are: "To allow by not prohibiting." "Permit means not to prohibit or prevent." These definitions, we believe, show the usual and ordinary significance of the word "permit." Accepting them as correct, we are forced to the conclusion that if a ram or he-goat run at large without the tacit consent of those in control, or if those in control make a reasonable effort to hinder or prevent such animals from running at large, then no offense has been committed under the statute.

Some of the same elements must necessarily enter into this case based upon simple negligence, for the complaint charges that the defendants "permitted said buck sheep to stray away," etc. To "run at large," we believe, involves the idea of voluntary, careless, negligent, or faulty action or omission on the part of those having the animals in charge. Whether or not in this instance the bucks of the defendants were running at large depends upon the facts. (*Presnall v. Raley* (Tex. Civ. App.), 27 S. W. 200; *Stephenson v. Ferguson*, 4 Ind. App. 230, 30 N. E.

714; *Leavenworth etc. Ry. Co. v. Forbes*, 37 Kan. 445, 15 Pac. 595; *Rutter v. Henry*, 46 Ohio St. 272, 20 N. E. 334.) It would, indeed, be a harsh and oppressive rule which would hold one liable in damages if, under any and all circumstances and conditions, and regardless of all reasonable or strenuous efforts on his part, or the impossibility of restraining the sheep, they should break away and inflict some injury.

This brings us to the question: Was the trial court warranted in determining, as a matter of law, under the evidence, that the [4] defendants were guilty of negligence, and so instructing the jury? A brief review, at least, of the evidence, is necessary to determine this question. We do not attempt to give the testimony word for word as contained in the record, as that is unnecessary for present purposes; but we do give the substance of the testimony of all witnesses for the plaintiff which in our opinion is necessary to consider in determining the question now under consideration:

Witness Skogan testified: That, at the time the bucks mixed with the ewes, he was herding the ewes at Rosebud Buttes, about seven miles south of the town of Rosebud. He first observed the bucks getting into the sheep on September 17, 1911. He found two bucks in with his sheep, and, about a day or two afterward, another one came. All three were killed. On the 23d of September, 1911, about 5 o'clock in the evening, there came a bunch of 84 bucks, which he was unable to keep from mixing with and covering the ewes. That from the time he commenced herding the ewes, in July, 1911, up to the time they commenced dropping lambs, there had not been any buck sheep with the ewes, except the ones mentioned.

Witness Williamson testified: That he was employed by plaintiff from the 4th day of January, 1912, to April 15, 1912. That he knew the witness Skogan, and that Skogan worked for the plaintiff a portion of the time that he (Williamson) did. That he was acquainted with the band of sheep taken by Skogan to Fromberg (being the ewes mentioned as having been mixed with

the bucks). That he knew of sheep that were at the Ball Ranch Company's ranch that dropped lambs in the winter time.

Witness Davis testified: That he was employed by the plaintiff and lived on the premises of the company; had been employed about three years. The first of the year 1912, he became foreman. That he was acquainted with witness Skogan and with the band of sheep Skogan was herding in September, 1911, at Rosebud Buttes. That plaintiff had another band about seven or eight miles southeast. It was not there until about the last of September. That Skogan's herd was divided, the old ewes from the young ones, in October. That these old ewes started to drop lambs about February 15, in all about 250. That all of these lambs died except six that he got rid of. That the minimum number of old ewes that died was 200.

Witness Williamson, recalled, testified: That he saw the dead lambs at the ranch of plaintiff in the spring of 1912. There was but one band dropping lambs. They commenced to lamb about February 15. That he saw the lambs dropped, and saw some of the ewes that dropped lambs, not all of them; counted 200 dead lambs.

Witness Bjornstad testified: That he lived on Six-Mile creek, in Custer county, and was there in the middle of September, 1911. That he was in the employ of the defendant Hendrickson, who sent him after a band of buck sheep. He was told to go the day Mr. Ball came over and told Hendrickson the bucks were over there. He went and got them. He found them in the corral at the Rosebud Buttes. Did not count the bucks. He brought them home to Hendrickson, who put them in the bunch of bucks that he had there. He had seen the bucks he brought back in this bunch before. They had been away three or four days when he went after them.

Witness A. M. Ball testified at some length. His testimony, however, is devoted mostly to the questions of proper breeding of sheep, their value, and the value of lambs. The only testimony given by this witness which can possibly have any bearing upon the question of negligence of the defendants is as follows:

"I don't know anything about any of these buck sheep being mixed with any of my sheep, only from hearsay. My men were there and had them cut out the morning I got there. I did not see the sheep when they were cut out, I got there just as the men were coming back from cutting out the sheep. It was about 9 o'clock in the morning. I did not see the buck sheep at all. I saw Mr. Hendrickson along toward noon or after noon that day. I rode up and notified him that we had found some of his bucks in our herd and that our men had cut them out and put them in a corral. Mr. Hendrickson at that time was right on section 30 near the creek. He said that he had had some trouble holding the bucks; that his dog was played out, and that he could not hold them; that he knew he was out some bucks, but how many he didn't know. He said if I would hold the bucks until he could get a man, he would go after them. I held the bucks, I and my foreman, while he went to the ranch and got a man. He got Mr. Bjornstad, the man who has just testified. Hendrickson told me that his dog played out; that he had trouble in holding them. The only reason he gave was that the dog was played out."

Without further comment, we say that a careful reading of this evidence convinces us that "different conclusions might be drawn by different men of fair, sound minds" on the question of defendants' negligence, and the matter should have gone to the jury and was not for the determination of the court. (*Anderson v. Northern Pac. Ry. Co.*, 34 Mont. 181, 85 Pac. 887, and cases there cited; Thompson's Commentaries on Negligence, sec. 7393.)

Instruction No. 14 given by the court is erroneous for the same reasons urged against instructions numbered 3 and 4.

Evidence of the value of the lambs which died was admitted on the trial, over the objection of appellants, and this is as-
[5] signed as error. We believe the objection should have been sustained. No recovery could be had for the lambs. This is, in fact, an action for trespass to personal property, and the measure of damages is, where the owner is wholly deprived of

such property, its market value at the time of trespass, and, under proper circumstances, interest from that time, in the discretion of the jury. The recovery for this wrong is limited to compensation, in the absence of aggravation for which punitive damages are allowable. (Sedgwick on Damages, 9th ed., secs. 432a, 433; Sutherland on Damages, 2d ed., sec. 1096; Thompson on Negligence, secs. 7242-7246; Rev. Codes, sec. 6044.) The rule is sound, for certainly the loss to plaintiff was the same whether the ewes were killed by reason of pregnancy or were stolen or shot to death. We should not feel inclined to reverse the case on the erroneous admission of testimony as to the value of the lambs, as there is some evidence in the case which might justify a verdict for \$800.

The record contains many other specifications of error, which we have considered, but we deem them of little or no merit.

For the reasons above given, the judgment and order appealed from are reversed and a new trial ordered.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

ADAMS, APPELLANT, v. STENEHJEM, ADMR., RESPONDENT.

(No. 3,460.)

(Submitted January 9, 1915. Decided January 30, 1915.)

[146 Pac. 469.]

Foreign Judgments—Authentication—Sufficiency—How Determined—Faulty Certificate—Evidence.

Foreign Judgments—Records—Authentication—Certificate.

1. The words "in due form" as used in section 7911, Revised Codes, in declaring that the certificate of the presiding judge of a court of another state must disclose that the attestation of the clerk of such court to a judicial record which is sought to be proved in a court of this state is "in due form," means the form prescribed by the law or practice of the state from which the record comes.

[As to authentication and effect of foreign judgments, see note in 82 Am. Dec. 411.]

Same—Authentication—How Determined—Judicial Notice.

2. Whether the attestation by a clerk of court of another state to one of its judicial records is in due form as defined above, must be determined from the certificate of the judge of such court, since the courts of this state do not take judicial notice of the statute laws or practice of a foreign state.

Same—Records—Attestation—Faulty Certificate—Evidence.

3. A copy of a judgment-roll of a court of another state, the certificate of attestation to which was to the effect that "said certificate of said clerk is duly authorized by law to be issued by such clerk, and full faith and credit are due to all his official acts as such," instead of that "the attestation is in due form," as required by section 7911, Revised Codes, was inadmissible in evidence.

Same—Records—Full Faith and Credit.

4. Whether a record of another state is entitled to full faith and credit in this state is a question to be determined by the court in which it is offered in evidence, and not by the judge of the court from which it comes.

[As to effect of foreign judgments, see notes in 7 Am. Dec. 324; 94 Am. St. Rep. 550.]

Same—Valid Judgment—Evidence.

5. Before the courts of this state can give faith and credit to a judgment of a foreign state, the evidence offered must disclose that it is valid and capable of enforcement by final process.

[As to necessity of alleging, in action based on foreign judgment of divorce, that court had jurisdiction, see note in Ann. Cas. 1913B, 1193.]

Same—Entry of Judgment.

6. In an action to recover upon a judgment rendered in another state, failure of plaintiff to show that it was entered in the court of its rendition was a failure to prove a judgment capable of enforcement.

Same—Validity, How Determined.

7. The validity of a judgment must be determined by the laws of the state where it was rendered.

Same—Book Entries—Evidence—When Inadmissible.

8. Where, in an action to recover on a foreign judgment, plaintiff did not make proof that the clerk of the court where it was rendered was required by law to keep a judgment docket and make a memorandum therein that judgment had been entered, evidence that an entry to that effect in such a book had been made was immaterial.

Appeal from District Court, Sheridan County; Frank N. Utter, Judge.

ACTION by O. O. Adams against A. O. Stenehjsem, as administrator of the estate of G. C. Meltzer, deceased. From a judgment for defendant, plaintiff appeals. Affirmed.

Messrs. Norris, Hurd & McKellar, for Appellant, submitted a brief; *Mr. Edwin L. Norris* argued the cause orally.

We submit that the expressions "that said certificate is duly authorized by law" and "that said certificate is in due form"

are in effect the same, and do not convey different meanings. An analysis of the two expressions seems to justify this conclusion. "In due form of law" means nothing more or less than in the form of or in accordance with law, and the expression "is duly authorized by law" means the same thing. The supreme court of South Dakota, in the case of *Davis v. Davis*, 24 S. D. 474, 124 N. W. 716, has approved a certificate in which the words "in due form" were omitted. The certificate of the judge, that the certificate of the clerk is in due form of law instead of the usual certificate that the attestation of the clerk is in due form, will not render the certificate invalid. (*Blair v. Caldwell*, 3 Mo. 353; *Edwards v. Jones*, 113 N. C. 453, 18 S. E. 500; *Gornto v. Bonney*, 7 Leigh (Va.), 234.) From the foregoing authorities, it appears that the use by the judge of the word, "certificate" instead of "attestation" is not a defect.

The following authorities hold that original papers and records are competent evidence in cases where certified copies of such papers are by statute made primary evidence also: *Bradley Timber Co. v. White*, 121 Fed. 779, 58 C. C. A. 55; *Bruce v. Manchester & K. R. R. Co.*, 19 Fed. 342; *Smith v. Veysey*, 30 Wash. 18, 70 Pac. 94; *McFadden v. Ferris*, 6 Ind. App. 454, 32 N. E. 107; *Sheehan v. Davis*, 17 Ohio St. 571; *Brooks v. Daniels*, 39 Mass. (22 Pick.) 498; *Doremus v. Smith*, 4 N. J. L. 142; *James v. Greensboro etc. Co.*, 47 Ind. 379; *Carp v. Queen Ins. Co.*, 203 Mo. 295, 101 S. W. 78. In the last mentioned case, the court holds that a statute similar to our section 7911 was enacted for public convenience and did not render incompetent original records and files. With the exception of Georgia, the holdings of the courts seem so uniform that other citations of authority would be cumulative, merely.

Proof that the judgment of the North Dakota court had been duly made and given had been presented to the court in the case at bar, and under the provisions of section 7962 it should have been assumed that the North Dakota clerk, being a court officer, had performed his duty and entered the judgment according to law. There was no proof offered to show that the

judgment had not been entered and docketed, and in fact the entry and docketing of the judgment is not necessary to the validity thereof. The entry and docketing of a judgment is a ministerial act. (*Parrott v. Kane*, 14 Mont. 27, 35 Pac. 243; *Kimpton v. Jubilee Placer M. Co.*, 22 Mont. 109, 55 Pac. 918; *Risk v. Uffelman*, 7 Misc. Rep. 133, 27 N. Y. Supp. 392; *Matter of Cook*, 77 Cal. 220, 11 Am. St. Rep. 267, 1 L. R. A. 567, 17 Pac. 923, 19 Pac. 431.)

Mr. Paul Babcock and *Mr. J. A. Heder*, for Respondent, submitted a brief; *Mr. Babcock* argued the cause orally.

The certificate of the judge must, under the Act of Congress, show that the attestation of the clerk is in due form. (*Hackett v. Bonnell*, 16 Wis. 471; *Tooker v. Thompson*, 3 McLean, 92, Fed. Cas. No. 14,097.) Failure of a judge to certify that the attestation of the clerk is in due form is fatal. (*Shown v. Barr*, 33 N. C. (11 Ired.) 296; *Buck v. Grimes*, 62 Ga. 605; *Wilburn v. Hall*, 16 Mo. 426; *Ordway v. Conroe*, 4 Wis. 45; *Hagan v. Snider*, 44 Tex. Civ. App. 139, 98 S. W. 213; *Chapman v. Chapman*, 74 Neb. 388, 104 N. W. 880.) The attestation of the clerk should be in the form prescribed for the court in which the judgment was rendered, and the certificate of the judge that the clerk's certificate is in due form is conclusive. (*Edwards v. Jones*, 113 N. C. 453, 18 S. E. 500; *Rennick v. Chloe*, 7 Mo. 197.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was instituted to recover a balance due upon a judgment rendered by a district court of North Dakota. Upon the trial, plaintiff offered in evidence a certified copy of the judgment-roll from the North Dakota court, but it was excluded upon the ground that it was not exemplified as required by law. Plaintiff then had the original files constituting the judgment-roll identified, and these were received in evidence, but afterward stricken out. A motion for nonsuit was sustained, and

from the judgment rendered and entered plaintiff has appealed. Errors are predicated upon the rulings of the trial court in excluding the offered papers.

1. The copies of the papers constituting the judgment-roll were attested by the clerk with the seal of the court annexed, and following his attestation there was a certificate by the judge: "That said certificate of said clerk of said district court is duly authorized by law to be issued by said J. O. Seibert, as such clerk of said district court, and full faith and credit are due to all his official acts as such."

Section 1, Article IV, of the Constitution of the United States, provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings, of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." In compliance with that mandate, the Congress in 1790 enacted what is now section 905, United States Revised Statutes, as follows: "The records and judicial proceedings of the courts of any state * * * shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, * * * together with a certificate of the judge, chief justice or presiding magistrate, *that the said attestation is in due form.*" Section 7911, Revised Codes of Montana, [1] declares that a judicial record of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form. The phrase "in due form," as thus employed, means in the form prescribed by the law or practice of the state from which the record comes.

Tested by these statutory provisions, the trial court's ruling upon the first offer was correct. To entitle the copy of the judgment-roll to be admitted in evidence, it must have been duly attested by the clerk of the North Dakota court. Whether [2] the attestation was in the due form prescribed by the

law or practice in North Dakota could not be determined by the trial court from an inspection of the attestation certificate; for the courts of this state do not take judicial notice of the statute laws or practice of a sister state. Because of this fact the trial court was required to look to other evidence, and the evidence which the federal statute and our own Code have provided is the certificate of the judge of the sister state. It is for that judge, charged with knowledge of the laws of his state, to determine whether the attestation of his clerk is in due form and to evidence his conclusion by his certificate, and it is to his certificate alone that the Montana court must look to ascertain whether what purports to be a certificate by the clerk is such under the laws of the state where made. (*Craig v. Brown*, Pet. C. C. 352, Fed. Cas. No. 3328.) Under the federal statute and our Code provision above, the district court of the [3] sister state is required to make known the fact that the copy is properly attested, by his certificate "that the said attestation is in due form." In the absence of such certificate as the federal statute and our Code prescribe, the copy is not entitled to be admitted. This rule is recognized universally. (*North-western Mut. Life Ins. Co. v. Stevens*, 71 Fed. 258, 18 C. C. A. 107; *Smith v. Brockett*, 69 Conn. 492, 38 Atl. 57; *Trigg v. Conway*, Hempst. 538, Fed. Cas. No. 14,172.)

But it is insisted that, while the certificate of the judge of the North Dakota court is not in the form prescribed by statute, in substance it is the same. If we understand the language employed in the certificate, it does not mean anything more than that the laws of North Dakota authorize the clerk of a district court of that state to certify copies of judicial records in his charge. It would impeach the intelligence of the judge who made this certificate to say that he intended it to conform to the requirements of the federal statute. The language of that statute is so plain that anyone who attempts to comply with it cannot possibly fail in the attempt. The addition of the words "and full faith and credit are due to all his official acts as such" do not aid the certificate. In the connec-

tion in which they are employed they are meaningless. Our courts are not required to give full faith and credit to the act of the North Dakota clerk in attesting a public record. If the record is attested by the clerk with the seal annexed, and the attestation is certified to be in due form by the judge, then full faith and credit is due the record—in this instance the judgment-roll—but not the act of the clerk in attesting it. Furthermore, whether a record is or is not entitled to full faith [4] and credit is a question to be determined by the Montana court, and not by the judge of the court from which the record comes.

We are unable to agree with the supreme court of South Dakota in *Davis v. Davis*, 24 S. D. 474, 124 N. W. 715, holding contrary to these views.

2. Conceding, for the purposes of this appeal, that the original [5, 6] files from the North Dakota court, if complete, were admissible in evidence upon the trial of this cause, under the best evidence rule (Rev. Codes, sec. 7850), we are still of the opinion that the action of the trial court in striking them from the record was correct. The only purpose in offering these original files was to prove a judgment of the North Dakota court, and, unless they tended to prove that fact, they were immaterial and irrelevant. It is apparent at once that, before the courts of Montana can give faith and credit to a judgment of a sister state, the evidence offered must disclose a valid judgment of such state capable of enforcement by final process. (23 Cyc. 1559; *Fall v. Eastin*, 215 U. S. 1, 54 L. Ed. 65, 17 Ann. Cas. 853, 23 L. R. A. (n. s.) 924, 30 Sup. Ct. Rep. 3.) The files from the North Dakota court show that a judgment was rendered, but they do not show that it was ever entered. The general rule is that the failure of the clerk to perform the purely ministerial task of entering a judgment will not vitiate it; but it is within the province of any state to determine when a judgment of its court shall become effective, and if the entry of the judgment in the judgment-book is a condition precedent

to its becoming effective as a judgment, the failure to prove such entry amounts to a failure to prove a judgment.

Some contention is made that a memorandum in the judgment docket tended to show that the judgment had been entered in the judgment-book, but the failure of plaintiff to show that under the laws of North Dakota the clerk was required to keep a judgment docket and to make therein the memorandum in question removes any foundation for such contention.

The validity of the judgment must be determined by the laws of the state where it was rendered. (*Caruthers v. Corbin*, 38 Ga. 75.) In *Amundson v. Wilson*, 11 N. D. 193, 91 N. W. 37, the supreme court of North Dakota, after referring to certain sections of their Codes, said: "Under these sections this court has held that 'there can be no judgment capable of being docketed or enforced in any manner until it is entered in the judgment-book' "—citing *In re Weber*, 4 N. D. 119, 28 L. R. A. 621, 59 N. W. 523.

Since these original files did not tend to prove a valid judgment under the laws of North Dakota, they were properly excluded.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

ROOD, RESPONDENT, v. MURRAY, APPELLANT.

(No. 3,466.)

(Submitted January 11, 1915. Decided January 30, 1915.)

[146 Pac. 541.]

Principal and Agent—Contracts of Employment—Public Officers—Personal Liability—Evidence—Insufficiency—Entirety of Contract—Pleading—Estoppel—Witnesses—Weight of Testimony—Dismissal of Cause.

Appeal and Error—Conflict in Evidence—Verdict Conclusive.

1. A judgment will not be reversed for alleged insufficiency of the evidence where the record shows a substantial conflict therein.

Principal and Agent—Public Officers—Personal Liability—Evidence—Insufficiency.

2. Evidence in an action in which defendant was sought to be held personally liable on a contract of employment alleged to have been made with the plaintiff while the former was superintendent of construction of public buildings for the state, held insufficient to support a verdict for plaintiff.

[As to liability of agent employing real estate broker for the latter's commission, see note in Ann. Cas. 1913E, 345.]

Evidence—Weight—How Determined.

3. The legal value of the evidence of a witness is not determined by his positive assertions alone, but by its entire content in the light of his admissions and contradictions.

Principal and Agent—Contracts—Public Officers—Personal Liability.

4. The rule that one dealing with the agent of a known principal in a matter within the scope of the agency cannot hold the agent, in the absence of satisfactory proof of the latter's intention to substitute his personal liability for that of the principal, is especially applicable to the case of an officer entering into a non-negotiable agreement for the performance of a public duty, it being presumed that he did not undertake personally to assume the public burdens.

Same—Pleading—Entirety of Contract—Estoppel.

5. Plaintiff having pleaded the contract of employment as an entirety could not thereafter assert that part of it was with the state at a certain wage per day, and the other part with defendant personally on a commission basis.

[As to entirety of contract when for services or other work, see note in 38 Am. Rep. 208.]

Appeal and Error—Dismissal of Cause, When.

6. Where plaintiff has had a fair opportunity to prove his cause of action and on appeal it appears that he obviously presented all he had to offer in that behalf, and failed, the cause will be ordered dismissed.

Appeal from District Court, Beaverhead County; Wm. A. Clark, Judge.

ACTION by Carl M. Rood against William V. Murray. Judgment for plaintiff, and defendant appeals from it and an order denying him a new trial. Reversed, and cause ordered dismissed.

Mr. J. A. Poore, for Appellant, submitted a brief and argued the cause orally.

Rood knew that Murray was the agent of the state—the “superintendent,” as he alleges in his complaint—and he therefore stood in the same position as an officer of the state, of which fact Rood had knowledge. One standing and acting in a public capacity, who makes a contract in behalf of the public, is not personally liable. (*Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 42; *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.) In order for a public officer to bind himself personally, the evidence must show the intent to be clear. (*Miller v. Ford*, 4 Rich. (S. C.) 376, 55 Am. Dec. 691; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502.) Public officers and agents will not be held personally liable upon contracts entered into by them in the public behalf, except in those cases where the intent is clearly apparent to bind them. (*Mechem on Public Officers*, sec. 806; 29 Cyc. 1446, and cases cited.) And action on the part of an officer in excess of his legal authority will not have the necessary effect of imposing upon him a personal liability, since those with whom he is dealing cannot be deceived by him. The extent of his authority may be ascertained by an examination of the law. (29 Cyc. 1447.) A well-defined distinction is made by the law between contracts entered into by the agent of a private principal and those of the agents of the public. It is considered presumed that the latter do not intend personally to assume the public burdens, and that the persons dealing with them do not rely upon their individual responsibility. (*Mechem on Public Officers*, sec. 805.)

If a person contracting with an agent has actual or presumptive knowledge that the agent has no authority to bind the principal, the agent cannot be held personally liable. And an agent

who, acting within the scope of his authority, enters into a contractual relation for a disclosed principal does not bind himself in the absence of an express agreement. (31 Cyc. 1550, 1552.) A party claiming that exclusive credit was given to the agent of a known principal has the burden of proving the fact by clear evidence. (*Meeker v. Claghorn*, 44 N. Y. 349; *Ferris v. Kilmer*, 48 N. Y. 300.) The rule is still stronger in the case of a public agent. (*Hall v. Lauderdale*, 46 N. Y. 70.) In order for Mr. Murray to be held personally liable in this case, the evidence must at least preponderate in favor of respondent. (Sec. 8028, Rev. Codes; *Flaherty v. Butte Electric Ry. Co.*, 42 Mont. 89, 111 Pac. 348.) Under the circumstances, and the record presented in this case, it was the duty of the trial court to grant a new trial. The testimony of the prevailing party is certainly not sufficient in weight to justify a verdict in his favor. (*Mullen v. City of Butte*, 37 Mont. 183, 190, 95 Pac. 597.)

Messrs. Pease & Stephenson, for Respondent, submitted a brief; *Mr. Harlow F. Pease* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The complaint in this action alleges: "That the defendant was, at all the times hereinafter mentioned, the general superintendent in charge of construction and repair work on the buildings belonging * * * to the Montana State Normal College, located at Dillon; * * * that the said construction and repair work consisted in erecting new foundation walls, columns, and other general repair work on the dormitory building, putting a new roof on the college building, and doing certain repair work about the boiler-room; * * * that on or about the 7th day of June, 1910, the said defendant hired and employed plaintiff to work as a laborer, and also as superintendent of the work above mentioned, agreeing to pay him therefor \$6 per day for his services as laborer, and for his services as superintendent five per cent of the cost of such work," which was \$15,400; that plaintiff performed his part of the contract; that "no part of the sum due

the plaintiff on the contract above set forth has been paid, except the wages for his services as laborer''; and that there is due him as commission for superintendence the sum of \$770, with interest, for which judgment is demanded. The answer admits the non-payment of such commission, denies any personal contract with the plaintiff, and alleges that defendant was, at all the times referred to, acting as an employee of the state of Montana, to-wit, its superintendent of construction under the control of the State Board of Examiners, as plaintiff then knew; that plaintiff was employed by the state of Montana as a laborer and as superintendent of said work, in the absence of defendant, at the agreed compensation of \$6 per day of eight hours, and seventy-five cents an hour overtime; that plaintiff presented his claims to, and received his pay from, the state of Montana for all services performed by him. The reply denies each and every allegation contained in the answer.

The trial was to a jury, and their verdict was for the plaintiff. Judgment followed accordingly. Motion for new trial was made and denied. The defendant appeals from the judgment and order denying him a new trial.

The sole question presented is whether the verdict and judgment [1, 2] are warranted by the evidence. Mindful of the oft-repeated rule that this court cannot reverse for insufficiency of the evidence where the record shows a substantial conflict, we shall, for the purpose of ascertaining whether there is such conflict, consider only the case as made by the plaintiff's own testimony, coupled with such circumstances presented by the defendant, as the plaintiff does not question nor deny.

On January 4 plaintiff was invited by telephone to go with defendant to examine the State Normal College, then in need of extensive repairs, with a view to taking charge of such work under the defendant. He did so, and after the examination expressed his willingness to proceed with the work. The parties then returned to Butte to look up material, and plaintiff dates his right to compensation from this time, though no terms had been agreed upon. He established himself at Dillon about June

8 and started work upon the ground. Ten or twelve days later the parties again met at Dillon, discussed and settled the wages that were to be paid for the different classes of labor; those of common carpenters being fixed at \$5 per day. This done, plaintiff inquired about his own wages, and defendant answered: "Well, on work of this kind it is usual that the superintendent gets about ten per cent; but I want you to be more than superintendent. I want you to take your tools here and have your working clothes here, and go down with the men and put on your overalls, handle your tools, and lay out the work for yourself. * * * Being that I want you to be personally posted on the work as well as taking charge, I have thought of paying you common carpenter wages, ordinary carpenter wages, and five per cent of cost, so that you would take interest in both parts of it equally. * * * Murray did not say then that the state of Montana would pay me five per cent. He said, 'When the job is finished I will give you five per cent.' Murray did not say anything to me at this time as to whether this contract was in his name or not. I did not know whether he was acting as contractor or superintendent. It was not in my interest to know. I was dealing personally with Mr. Murray. I had never heard that he was dealing with me as a state employee. I had nothing to do with any state officials, any state board, or anything of that kind." The contention of the plaintiff is that the foregoing and other positive assertions of like import contained in the record are sufficient to establish, *prima facie*, that his contract was with the defendant personally and not as superintendent, and therefore sufficient, as against any opposition the defendant could make under his answer, to create a substantial conflict and to sustain the verdict. Taken alone and at face value, we may assume that they are. But the right of the plaintiff to make this contention is extremely doubtful, in view of the first paragraph of the complaint, for that is without purpose, unless the defendant made the contract as general superintendent in charge of the work. The positive assertions of the [3] plaintiff cannot be taken alone, without regard to his

formal allegations or to what he says elsewhere in his testimony. The legal value of a body of evidence is to be determined by its entire content, and not by any single feature, the effect of which may be destroyed by admissions or contradictions emanating from the same source. Plaintiff further testified: "Q. When did you first become aware of the fact that Murray was acting for the state and not for himself? A. I do not suppose I had been there more than two weeks until I knew."

Asked on cross-examination if the defendant did not, at the time the agreement was made, say anything "about being superintendent of the work at the Capitol building and simply acting for the state of Montana down here, and he wanted a man to come and take his place in this work." the plaintiff answered: "He said he wanted a competent man; that is what he wanted me to be. As to his position as superintendent, I knew that before. Q. When did you first find that out? A. I found that out; he was called here from New York in the winter-time to consider the acceptance of the position at the Capitol building, superintendent of construction of the Capitol building, so I knew his capacity as superintendent of construction of the Capitol wings."

On redirect: "Q. During the time that you were working on the State Normal College, did you know Murray's exact official capacity in the state of Montana? A. I did know it in one respect, as I stated yesterday. I knew before he took his office as superintendent of construction of the State Capitol that he was to come here to occupy that position as superintendent of construction or supervisor of construction of the Capitol wings. About the time that I was employed to go to Dillon he made the statement that he also had to take the position of superintendent of construction of public buildings as well. * * * When we agreed upon my compensation, I said, 'How am I to be paid?' He said, 'You put in your claim to the state and send it to me.' Then I asked him: 'Who am I dealing with? Am I dealing with the state or am I to understand I am dealing with the State Board of Examiners or any of the state

officials?' He said, 'No, sir; you are my man here.' " Touching this last circumstance the plaintiff admitted on recross-examination that he had not remembered it upon any of the three examinations concerning the same matter to which he had been previously subjected. Asked if Murray "was superintendent of construction, who was he superintendent for," plaintiff answered: "For the state of Montana, I suppose." He later added: "I had nothing to do with the state, not directly, because Murray hired me, made all the arrangements, gave me my instructions."

The upshot of all this, to take the view most favorable to plaintiff, is that he meant to stand upon his pleading and to show a single contract for two things (carpenter work and superintendence); that when the contract was entered into he knew the Normal College to be a public building of the state; that he understood the defendant to be superintendent of construction of public buildings for the state, and therefore incapable of having a private contract for the work; but that, notwithstanding this, he assumed his contract to be with the defendant personally, because he dealt with the defendant, who used the pronoun "I" in defining the duties and compensation of the plaintiff. This is not enough. There is no contention here that the defendant is liable because he acted beyond his powers; [4] and one who deals with the agent of a known principal, touching a matter within the scope of the agency, cannot hold the agent in the absence of satisfactory proof of an intention on the part of the agent to substitute his personal liability for that of the principal. (31 Cyc. 1552; *Hall v. Lauderdale*, 46 N. Y. 70.) This is especially true in the case of a public officer who has entered into an agreement, not negotiable, for the performance of a public duty; "the intent of the officer to bind himself personally must be very apparent, indeed, to induce such a construction of the contract." (*Hodgson v. Dexter*, 1 Cranch, 345, 2 L. Ed. 130.) In such a case, it is to be presumed that he did not undertake personally to assume the

public burdens. (Mechem on Agency, sec. 426; Mechem on Public Officers, secs. 805, 806.)

Whether the plaintiff did actually believe his contract to be as pleaded, and the value of his positive assertions in that regard, are further illuminated by the following circumstances: Between June 16, 1910, and November 22, 1910, he presented at intervals of about two weeks, upon forms provided by the state for the purpose, eleven claims against the state, verified by his oath. These claims covered all his wages for labor and overtime as they accrued, traveling expenses for consultation with the defendant, postage charges on reports to defendant, and other items. They were sent addressed to the defendant as state superintendent of construction, were paid from time to time by warrants of the state, and these warrants were received, indorsed, and turned into money by the plaintiff. Conceding this to be the fact, he seeks to distinguish between his wages and the compensation for superintendence. He charges Murray with saying: "You put in your claim for the day's wages the same as you do the rest of the men, and when the job is finished I will give you five per cent." But no such distinction can be made under the contract as pleaded; nor is it borne out by the [5] claims mentioned above. The contract as pleaded is an entirety. If any part of it was with the state, all of it was; and the claims presented and paid covered items which could accrue to the plaintiff only as a foreman or person more or less in charge of the work. Moreover, on April 1, 1911, in a letter to defendant as superintendent, regarding some work to be done at Dillon, the plaintiff wrote: "With reference to the work at Dillon, in view of the possibility of nearly half of it, or probably more than half, being let on contract, and in such case I would not have more than equal chance with a number of others, if it can be counted that I would have that much, I would appreciate to know if there is any reasonableness in expecting foreman's wages or more than day's wages, as was talked of last year, and if the president of the institution and the State Board of Examiners know that I did not get more than common wages

last year, so it would not be considered unreasonable or attempting to take advantage of anything or anybody to ask for it." The plaintiff's efforts to explain this letter simply add to his difficulties. No demand for payment of the present claim was ever made until after defendant had resigned his office and after a difference between them, amounting to \$200, had arisen out of another transaction. The plaintiff's view of the present claim, up to that time, may be gathered from the following: "Q. Is it not a fact, Mr. Rood, that the only reason you commenced this suit was because you had some other difficulty with Mr. Murray wherein you claimed he owed you additional money for some work you did for him in 1911, and you sent your attorney to Mr. Murray, and your attorney told Mr. Murray that if he did not pay that claim you would commence suit against him for the five per cent and also for the other claim? A. It is the truth, I guess. Q. That is the truth. You admit that, don't you? A. Yes, sir. Q. If Mr. Murray had paid you the claim which you claimed was due in that other suit, you would not have brought this suit? Answer, 'Yes' or 'No.' A. That I do not know."

In view of the foregoing, as well as of other circumstances apparent in the record, we think it impossible to give to the positive assertions of the plaintiff any value whatever. He knew, or should have known, that his contract was with the state, and there is no substantial evidence to justify any other conclusion.

The judgment and order appealed from are reversed; and as [6] the plaintiff has had one fair opportunity to prove his cause of action, has obviously presented all he had to offer in that behalf, and has failed, the district court is directed to dismiss the case.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied February 27, 1915.

STATE EX REL. DOWEN, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 3,615.)

(Submitted January 21, 1915. Decided February 1, 1915.)

[146 Pac. 467.]

*District Judges—County Commissioners—Filling Vacancy in
Board—Ministerial Duty—Certiorari.*

1. The power to fill a vacancy in the office of county commissioner residing in the district judge of the district in which the vacancy occurs is ministerial, not judicial, in character; therefore, *certiorari*, which may issue only to review acts done by an inferior tribunal, board or officer in the exercising of judicial functions does not lie to annul an order filling a vacancy deemed by the judge to exist in that office in a newly created county because of the alleged unconstitutionality of the Act under which the office was filled by election, and because the incumbent was holding two other offices regarded by him as incompatible.

[As to who may file a bill of review, see note in Ann. Cas. 1914C, 126.]

Certiorari by the State, on the relation of Thomas Dowen, against the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Blaine, and Frank N. Utter, a judge thereof. Dismissed.

Messrs. Norris & Hurd, for Relator, submitted an original and a supplemental brief; *Mr. E. L. Norris* argued the cause orally.

Messrs. O'Keefe, for Respondents, submitted a brief; *Mr. Robt. E. O'Keefe* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for *certiorari*. By virtue of a special election held on February 20, 1912, in pursuance of the provisions of Chapter 112 of the Laws of 1911 relating to the creation, organization and classification of new counties, the county of Blaine was created out of territory theretofore included in Chouteau county. Prior to the election the board of commissioners of

Chouteau county gave notice thereof by proclamation, as required by the Act, that officers of the proposed new county, including three commissioners, were to be elected. It was declared therein that one of these was to be elected for a term of two, one for a term of four, and one for a term of six years. The relator herein, a qualified elector of the proposed new county, became a candidate for the term of six years. His name was printed upon the official ballot among the candidates for election for this term. A canvass of the returns disclosed that a majority of the votes cast were in favor of the creation of the new county. It further disclosed that the relator had received the highest number of votes for the office of commissioner. The new county was declared created, the relator was declared elected, and a certificate of his election was duly issued to him. He immediately qualified and entered upon a discharge of his duties. His right to hold the office for the full term of six years was never questioned by anyone until January 12 of this year. On that date Hon. Frank N. Utter, one of the judges of the twelfth district of which Blaine county forms a part, on his own motion made and filed with the clerk of the district court of Blaine county an order of which the following is a copy: "Therefore, a vacancy existing in the office of county commissioner of Blaine county, Montana, the term of which office expires on the first Monday of January, 1917, and which office the said Thomas Dowen has heretofore claimed to hold, it is ordered that Robert E. O'Keefe, of Chinook, Montana, be and is hereby appointed to the office of county commissioner of Blaine county, to hold said office, under the law, until the first Monday in January next after the first general election hereafter, and until his successor is elected and qualified." The order is prefaced by a statement of the reasons which prompted Judge Utter's action, viz.:

(1) That the provisions of the statutes so far as they related to the election of county commissioners are invalid, because in conflict with the Constitution.

(2) That after he assumed the office of commissioner the relator became a candidate for and was elected to the office of school trustee of one of the school districts of the county, and that he now holds the office.

(3) That after his election to the office of commissioner he accepted an appointment from the sheriff as special deputy which he now holds.

Prior to the date of the order, no action or special proceeding of any kind had been instituted to have determined the relator's right to the office, nor had any notice been given him that his office was deemed vacant for any cause, or that his right to hold it was questioned by anyone. Upon the making of the order, the appointee, R. E. O'Keefe, asserted a right to the office and to perform the duties and receive the emoluments pertaining to it. The relator thereupon instituted this proceeding to have the order annulled, on the ground that it was made without authority of law and in excess of jurisdiction. There are several reasons why the relief sought herein may not be granted. Of these it will be necessary to notice but one.

The power to fill a vacancy in the office of county commissioner [1] is conferred by the Constitution upon the district judge of the district in which the vacancy occurs and the provisions of the statute enacted in pursuance thereof. (Const., Art. XVI, sec. 4; Rev. Codes, sec. 2883; Laws 1913, Chap. 5, sec. 1.) Though it is vested in a judicial officer, it is not a prerequisite to its exercise that it be invoked by an application in the form of a complaint or petition; nor is the validity of its exercise in a given case made dependent in any measure upon facts judicially ascertained to exist. The appointing officer pronounces no decree, nor does he adjudicate any right. His action is the result of an opinion based upon personal knowledge of the existence of the vacancy, or information derived from any source which he deems reliable. If a vacancy exists, the appointment is valid; if it does not, the act of appointment is nugatory. The power is therefore executive or ministerial in character, of the same quality as that vested in the governor to

fill a vacancy in the office of the judge of the district court or a justice of the supreme court, or in any other office a vacancy in which he is given power to fill by appointment. Though it is vested in a judicial officer, its nature is not therefore changed; nor, it may be added, do the formalities in which the order or notice of appointment is expressed affect its quality in the least. While it may be a debatable question whether or not such a power ought to have been vested in a district judge, the fact that it is vested in this officer does not change its quality. (*People v. Bush*, 40 Cal. 344; *Lorbeer v. Hutchinson*, 111 Cal. 272, 43 Pac. 896; *People ex rel. Dunham v. Morgan*, 90 Ill. 558; *Taylor v. Commonwealth*, 3 J. J. Marsh. (Ky.) 401; *Mayor, etc., v. State*, 15 Md. 376, 74 Am. Dec. 572.)

Now, the writ of *certiorari* may issue only to an inferior tribunal, board or officer exercising judicial functions, to annul acts done without or in excess of jurisdiction. (Rev. Codes, sec. 7203.) It cannot therefore be extended to the review of merely ministerial or executive acts, no matter whether they are done in strict conformity with the purpose for which the power was granted to the officer exercising it, or are the result of mistaken or willful abuse of it.

In their briefs, counsel for the relator have devoted a great deal of space to an effort to establish the proposition that upon the face of the order of appointment Judge Utter acted judicially in determining the facts upon which he based the conclusion that there was a vacancy in the office. Incidentally they argue that he, without warrant, declared the provision of the law referred to unconstitutional; also, that he judicially determined the question of incompatibility in the offices held by the relator. All these matters are wholly beside the mark, once the conclusion is reached that Judge Utter acted only in a ministerial capacity.

Of the correctness of our conclusion on this subject we have no doubt. The result is that the writ heretofore issued must be set aside, and the proceeding dismissed. It is so ordered.

Dismissed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

**JOHNSON, APPELLANT, v. COUNTY OF LINCOLN ET AL.,
RESPONDENTS.**

(No. 3,567.)

(Submitted January 15, 1915. Decided February 2, 1915.)

[146 Pac. 471.]

***Taxation—Public Lands—Delinquent Tax Sales—Injunction—
Complaint—Insufficiency—Land Department—Rules and
Regulations—Effect.*****Public Lands—Equitable Title—Taxation.**

1. Where one qualified to enter public land has fully complied with the federal statute and the rules and regulations of the Interior Department promulgated to carry its provisions into effect, and his application has been finally approved, but has not yet received patent, he is vested with an equitable interest in the land which is subject to taxation.

[As to holder of inchoate title to public land as freeholder, see note in Ann. Cas. 1913D, 328.]

Same—Regulations of Land Department—Effect of.

2. Rules of the Interior Department, promulgated to carry into effect statutes relating to the disposition of public lands, have the force of statutes and will be judicially noticed by the courts.

Same—Taxation—Power of State.

3. A state is without power to tax public lands held by one under a preferential right of entry when surveyed and opened to settlement; hence, where such land is sold for delinquent taxes, the deed conveys no interest in it.

Same—Delinquent Tax Sales—Injunction—Complaint—Insufficiency.

4. Where it appeared from the complaint in an action to enjoin a county treasurer from selling land for delinquent taxes, that plaintiff had neither equitable nor legal title to the land but only a preferential right of entry, the threatened sale could not cast a cloud upon his title as alleged, and a general demurrer to the complaint was properly sustained.

[As to taxpayers' actions, see note in Ann. Cas. 1913C, 892. As to injunction to restrain collection of taxes and assessments, see note in 69 Am. Dec. 198.]

Appeal from District Court, Lincoln County; John E. Erickson, Judge.

ACTION by Charles E. Johnson against the county of Lincoln and its treasurer. From a judgment for defendants, plaintiff appeals. Affirmed.

Cause submitted on briefs of counsel.

Mr. Harry H. Parsons, for Appellant.

The case seems on all-fours with and to have been foreclosed by the circuit court for the northern district of Idaho in an opinion rendered by Judge Dietrich in the case of *Clearwater Timber Co. v. Shoshone County*, 155 Fed. 612. Aside from this case: "Neither the legal nor the equitable title to the land in question passed from the government, so as to subject said land to taxation." (*Gibson v. Choteau*, 13 Wall. 92, 20 L. Ed. 534; *Grant v. Iowa etc. Land Co.*, 54 Iowa, 677, 7 N. W. 113; *Reynolds v. County of Plymouth*, 55 Iowa, 93, 7 N. W. 468; *Calder v. Keegan*, 30 Wis. 126; *Wisconsin Cent. R. R. Co. v. Price County*, 133 U. S. 496, 33 L. Ed. 687, 10 Sup. Ct. Rep. 341; *Sargent v. Herrick*, 221 U. S. 404, 55 L. Ed. 787, 31 Sup. Ct. Rep. 574; *Robertson v. Sewell*, 87 Fed. 536, 31 C. C. A. 107.)

Mr. D. M. Kelly, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In this suit a general demurrer was sustained to the complaint, and plaintiff, electing not to plead further, suffered judgment to be entered against him, and appealed. Does the complaint state a cause of action?

It is alleged that under the Act of Congress of June 4, 1897 (30 Stats. at Large, 36), forest reserve scrip was issued to certain settlers who had claims within a national forest, and which claims were surrendered to the government; that plaintiff purchased the scrip, and thereafter made selections of lieu lands for filing by virtue of the scrip; that the selections and scrip were tendered to the local land office and forwarded to the general land office at Washington; that the commissioner temporarily approved the selections in 1909, but has never generally or finally approved the same, and neither a receiver's receipt nor patent has ever been issued; that the selected lands at all times mentioned were and now are vacant, unsurveyed pub-

lic lands of the United States, to which plaintiff has neither legal nor equitable title; that plaintiff is a preferential entryman, with prior and preferred right to enter such lands as soon as the same are surveyed, the surveys approved, and the lands opened to settlement or entry; that in 1913 the assessor of Lincoln county listed the selected lands for assessment to plaintiff; that the taxes levied for that year were extended on the tax-roll; that plaintiff refused to pay such taxes, and the same became delinquent; that the county treasurer threatens to sell the lands to satisfy the taxes and costs; and that the sale, if made, "will cast a cloud upon the title of the plaintiff." The complaint prays for an injunction restraining the sale.

On behalf of the respondents, the attorney general suggests to the court:

First. If the particular allegations of the complaint, which [1] detail the proceedings taken by plaintiff and his predecessors, disclose an equitable title in plaintiff to these lands at the time the assessment was made, then such interest was subject to taxation, and this is clearly correct. (*Wisconsin Central R. R. Co. v. Price County*, 133 U. S. 496, 33 L. Ed. 687, 10 Sup. Ct. Rep. 341.)

Second. If, on the other hand, the general allegation of the complaint that, at the date of the assessment, the lands were unoccupied unsurveyed lands, belonging to the United States, be accepted as true, then, while such lands are exempt from taxation, plaintiff has pleaded himself out of court by disclosing in his complaint that he does not have any interest in the lands which can be prejudiced by the treasurer's sale.

1. The Act of June 4, 1897, grants to a settler upon lands within a national forest the right to relinquish his claim and to take in lieu thereof an equal number of acres of government land without the limits of the reservation, provided, in case the relinquished claim is unperfected, the requirements of the law respecting settlement, residence, improvements, *etc.*, are complied with on the new claim; credit being allowed for the time spent on the relinquished claim. Among the regulations of the In-

terior Department promulgated to carry the provisions of that Act into effect, Rule 18 provides: "All applications for change of entry or settlement must be forwarded by the local officers to the commissioner of the general land office for consideration, together with report as to the status of the tract applied for." These department regulations have the force and effect of statutes (*Caha v. United States*, 152 U. S. 211, 38 L. Ed. 415, 14 Sup. Ct. Rep. 513), and will be judicially noticed by the courts. (*Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U. S. 301, 47 L. Ed. 1064, 23 Sup. Ct. Rep. 692.)

Whether the selector was qualified to enter the lands in question, whether he complied with the law, and whether the selected lands were open to entry, were questions which had to be determined before even the equitable title could vest in plaintiff. As said by the supreme court in the case last cited: "The mere filing of papers cannot create such title. The applicant must comply with and conform to the statute, and the selector cannot decide the question for himself." Before the equitable title can vest in the applicant, the questions presented for determination upon the application must be decided by some officer of the government authorized to act in that behalf, and his determination is evidenced by his final approval of the selections. Under Rule 18 above, the officer designated to determine these questions is the commissioner of the general land office, with the possible right of review lodged in the secretary of the interior; and, until his final decision is made, neither the legal nor equitable title passes to the selector. The court, in the case last cited above, further said: "Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the land department had adopted Rule 18, above referred to, which provides for the forwarding of all applications for change of entry or settlement to the commissioner of the general land office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not,

as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to the land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed—some decision by an officer authorized to make it. Under the rule above cited, that decision has not been made. The general land office has (so far as this record shows) come to no conclusion in regard to it." (*Sjoli v. Dreschel*, 199 U. S. 564, 50 L. Ed. 311, 26 Sup. Ct. Rep. 154; *Clearwater Timber Co. v. Shoshone County* (C. C.), 155 Fed. 612; *Wm. E. Moses*, 33 Land Dec. Dept. Int. 333.)

The particular allegations of this complaint do not disclose any title to or interest in these lands subject to taxation at the time the assessment was made.

In *State v. Itaska Lumber Co.*, 100 Minn. 355, 111 N. W. 276, the court, considering a case involving like principles, said: "But, before the land can be taxed by the state as the property of the beneficial owner, a perfect equitable title must be vested, and the consideration fully paid to the United States. As long as the government retains the legal title as security for the payment of any part of the purchase money, the land is not subject to taxation. * * * The presentation of the scrip, with an application to locate it upon certain land, gave the applicant the preference over other subsequent claimants of the land; but, until the application was approved and acted upon by the commissioner, the applicant acquired no interest, legal or equitable, in the land as against the United States. During the intervening time it might have been withdrawn from entry or disposed of by the government in some other manner. Payment for the land was not made until the scrip was approved and the receipt therefor issued."

2. Upon any view of the complaint, it is made to appear that at the date of the assessment the lands in question were vacant, unsurveyed public lands belonging to the United States. Over [3] their disposition the government had complete control (U. S. Const., Art. IV, sec. 3), and they were exempt from taxa-

tion by section 2, Article XII, of the Constitution of this state. The tax for the collection of which the sale is threatened is absolutely void. The government was the owner of the lands, and its rights cannot be prejudiced by any sale which the county treasurer may make. His tax deed, if one should be issued, will not convey any interest in the lands whatever. (*Sargent v. Herrick*, 221 U. S. 404, 55 L. Ed. 787, 31 Sup. Ct. Rep. 574.)

With these premises established, the conclusion follows that the sale, if made, cannot cast any cloud upon plaintiff's title, [4] for he has none, and will not affect his preferential right of entry. It is axiomatic in the law that one who is not injured or threatened with injury cannot complain. "A cause of action is the right which a party has to institute a judicial proceeding. * * * It is composed of the right of the plaintiff and the wrong of the defendant * * * and the wrong of the defendant is the infringement of plaintiff's right." (*Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960.)

Since it appears that the contemplated sale by the treasurer will not infringe any right of plaintiff to these lands, a cause of action to restrain the sale is not stated.

Whether the tax levied in this instance has the effect of a judgment enforceable against the plaintiff, irrespective of the lands assessed, is a question not raised nor considered. The only complaint made is that the sale by the county treasurer "will cast a cloud upon the title of this plaintiff," and in this we have determined that plaintiff's apprehension is groundless. It is unnecessary to decide whether unsurveyed lands are subject to taxation under any circumstances. In pleading facts which disclose that he does not have any interest in these lands which can be affected adversely by the threatened sale, plaintiff has successfully pleaded himself out of court.

The complaint does not state a cause of action. The demurrer was properly sustained, and the judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. FIRST TRUST & SAVINGS BANK OF
BILLINGS, RELATOR, v. DISTRICT COURT ET AL., RE-
SPONDENTS.

(No. 3,605.)

(Submitted January 16, 1915. Decided February 10, 1915.)

[146 Pac. 539.]

*Certiorari — Return — Pleading — Corporations — Receivers —
Parties—District Judges—Disqualification.*

Certiorari—Affidavit not a Pleading.

1. The only purpose of relator's affidavit in *certiorari* is to move the reviewing court to act; upon the issuance of the writ it becomes *functus officio*; it is not a pleading and not traversable.

[As to persons entitled to prosecute writ of *certiorari*, see note in 103 Am. St. Rep. 110.]

Same—Return—What Does not Constitute.

2. The return in *certiorari* running to a court must be made by its clerk (Rev. Codes, sec. 7205); hence an answer to the averments of relator's affidavit, filed by the judge of the court as his "return," was not such and had no place in the proceedings.

Banks—Receivership—Parties—District Judges—Right to Disqualify.

3. By the appointment of a receiver in aid of a suit by the state against a bank to have it declared insolvent and its business wound up the corporation was not deprived of its right, as a party to the suit, to disqualify the judge before whom it was pending for imputed bias and prejudice, under amended section 6315, Revised Codes (Laws 1909, p. 161).

Receivers—Appointment—Action Pending.

4. An action may not be brought solely for the appointment of a receiver; to justify such appointment there must be an action pending.

[As to when the appointment of a receiver is proper, see note in 72 Am. St. Rep. 29.]

Same—Not Parties to Action Pending.

5. A receiver does not by virtue of his appointment become a party to the action in which, as a matter of ancillary relief, he was appointed.

[As to liabilities of receiver, see note in 120 Am. St. Rep. 277.]

Certiorari by the State of Montana, on relation of the First Trust & Savings Bank of Billings, Montana, against the District Court of the Thirteenth Judicial District in and for the County of Yellowstone, and George W. Pierson, a Judge thereof. Motion to quash writ overruled and order annulled.

Mr. D. M. Kelly, Attorney General, and *Mr. J. H. Alvord*, Assistant Attorney General, for Relator, submitted a brief; *Mr. Alvord* argued the cause orally.

Messrs. Goddard & Clark, for Respondents, submitted a brief; *Mr. O. F. Goddard* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On July 10, 1910, the First Trust & Savings Bank of Billings, a domestic corporation, failed to open for business, and the state, one of its creditors, instituted a suit in the district court of Yellowstone county against the bank to have it declared insolvent and its business wound up. The complaint also prayed that a receiver be appointed to take over the property belonging to the bank and to administer the trust fund for the benefit of those entitled to share in its distribution. Such proceedings were had thereafter that on July 14 S. G. Reynolds was appointed receiver and acted as such until July, 1912, when he resigned. Arthur H. Brown was thereupon appointed in his stead and duly qualified, entered upon the discharge of his duties as such receiver, and continued actively until suspended. On November 24, 1914, while the original suit was still pending, and while a large amount of property belonging to the trust estate was still undisposed of, the defendant bank caused to be filed in the district court an affidavit seeking to disqualify Hon. George W. Pierson, one of the judges, for bias and prejudice; but, notwithstanding such affidavit, Judge Pierson on November 27 made an order suspending the receiver, and the bank thereupon secured a writ of *certiorari* from this court to review the order. In response to the writ, the clerk of the district court has certified all the records of the proceedings relating to the order in question. The respondents have moved to quash the writ, and the matter is before us for determination.

We have presented also a document entitled "Return of Re-[1] spondent George W. Pierson." This is in the nature of

a pleading—an answer to the averments in the affidavit for the writ—but it is not a return and has no place in this proceeding.

The writ of review is issued upon a proper affidavit by a party beneficially interested. (Sec. 7204, Rev. Codes.) The only purpose of such affidavit is to move the reviewing court to act. When the writ is issued, the affidavit becomes *functus officio*. It is not a pleading, and its averments cannot be traversed by any other pleading. The writ commands the party to whom directed to certify a transcript of the proceedings sought to have reviewed (sec. 7206); and, if directed to a court, the [2] clerk is ordered to prepare and certify the record to the reviewing court (sec. 7205). The record thus duly certified constitutes the only return which can be made (6 Cyc. 804); and the only questions which can be presented for determination to the reviewing court must appear affirmatively from the face of this record. "The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board or officer, has regularly pursued the authority of such tribunal, board or officer." (Sec. 7209.) The document designated the return of the respondent judge must therefore be disregarded.

The question presented by the record is: Did Judge Pierson have authority to suspend the receiver after the disqualifying [3] affidavit was filed? Section 6315, Revised Codes, as amended by an Act of the eleventh legislative assembly (Laws 1909, p. 161), authorizes any party to an action, motion, or proceeding to file with the clerk of the court, in which the same is pending, an affidavit that he has reason to believe and does believe that he cannot have a fair and impartial trial or hearing before a district judge presiding in the court, by reason of the bias or prejudice of such judge. Upon filing the affidavit, the statute in question declares that the judge, as to whom the disqualification is averred, shall be without authority to act further in the action, motion or proceeding, except to arrange the calendar, regulate the order of business, transfer the case to another court, or call in another judge to act. The attorney general, for the respondents, concedes that, prior to the appoint-

ment of the receiver, the defendant bank might have exercised the power conferred by the so-called Fair Trial Law (Rev. Codes, sec. 6315), but that the order appointing the receiver operated to suspend the functions of the bank as a corporation, including its function to sue or be sued with reference to any matter connected with the receivership; and it is argued that, since the bank could not sue, it could not take any action in the pending suit, such as filing a disqualifying affidavit.

The powers and duties of a receiver are enumerated in section 6703 of the Revised Codes as follows: "The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver, to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize." The appointment of a receiver for a corporation invests the receiver with the right to the possession and control of the corporation's assets, and to the same extent suspends the functions of the corporation. Suits with reference to the trust estate must thereafter be prosecuted by the receiver, and, to the same extent that this power is lodged in the receiver, it is withdrawn from the corporation. This is the general rule and sufficient for the purposes of the proceeding now under consideration. (*Boston & Mont. C. C. & S. Min. Co. v. Montana Ore Pur. Co.*, 24 Mont. 142, 60 Pac. 991.) But the appointment of a receiver for a corporation does not operate to dissolve the corporation (*Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1, 40 L. Ed. 595, 16 Sup. Ct. Rep. 439), or to transfer the ownership of the property involved in the receivership. The property still belongs to the corporation, though it is in the hands of the receiver to be administered under the law. (*Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. Ed. 832.) Coextensive with the corporation's interest in the property while in the hands of the receiver is its interest in the management of that property by the receiver. In the present instance, the bank is still a party to the original suit in which the receiver was appointed and a

real party in interest. It may object to a report by the receiver or to a sale or other disposition of the property or any part of it by him. (*Polk v. Johnson* (Ind. App.), 76 N. E. 634.) Neither did the order appointing the receiver operate to terminate the action in which the receiver was appointed. That action is still [4, 5] pending undetermined. It is a well-settled rule of law that there cannot be such a thing as an action brought distinctively and solely for the appointment of a receiver. An action must be pending before a receiver can be appointed. (Rev. Codes, sec. 6698.) The appointment is an ancillary remedy in aid of the primary object of the litigation between the parties. (*Murray v. Superior Court*, 129 Cal. 628, 62 Pac. 191.) Under our Code, a receivership is classed as a provisional remedy, and is not frequently referred to as an "equitable execution before judgment." (*Kreling v. Kreling*, 118 Cal. 421, 50 Pac. 549.) While, for certain purposes, the receiver represents the bank, he does not do so in the pending suit. He is not in any sense a party to that action, but is an officer of the court, subject to its orders and control. The receiver would not be permitted to file a disqualifying affidavit, and, unless the defendant bank may do so, we are confronted with the situation where one party—the plaintiff—may exercise this right of disqualification which would be denied to the other. But that is not the language nor the meaning of the provision above. However much the statute may be abused, however much the courts may be imposed upon under its sweeping provisions, it is still the law of this state, binding upon courts and judges, and to be administered according to its true intent and purpose.

The very general terms employed by the courts and text-writers with reference to the authority and control of a court over a receiver appointed by it have reference always to a court which does not labor under any disability.

The affidavit in this instance was filed in the pending suit, and the inhibition of the statute necessarily limited the judge, against whom the disqualification was averred, to the arrangement of the calendar, the regulation of the order of business,

the removal of the cause to another court, or the calling in another judge to act in his stead. No question is made as to the sufficiency of the affidavit or its timely presentation. The record discloses that, in making the order suspending the receiver after the disqualifying affidavit was filed, Judge Pierson exceeded the authority vested in him. The motion to quash is overruled, and the order is annulled.

Order annulled.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER CONCUR.

WAITE, RESPONDENT, v. SHOEMAKER & CO., APPELLANT.

(No. 3,463.)

(Submitted January 11, 1915. Decided February 13, 1915.)

[146 Pac. 736.]

Contracts—Partial Performance—Quantum Meruit—Election of Remedies — Inconsistent Pleadings — Fraud — Ratification — Difficulty in Performance—Reply—Estoppel—New Trial.

Contracts—Quantum Meruit—Inconsistent Pleadings—Effect.

1. Where, in an action to recover for services rendered, plaintiff in one count of his complaint declared upon a contract in writing and in another upon a *quantum meruit*, and in his reply sought to avoid the writing on the ground of fraud, he must be held to have abandoned the cause of action upon the contract, inasmuch as by the alleged misrepresentation a meeting of minds, or the formation of a contract, was prevented.

[As to *quantum meruit* under special contracts, see note in 19 Am. Dec. 272.]

Pleading and Practice—Office of Reply.

2. The reply is only responsive to matters alleged affirmatively in the answer, and cannot perform the office of amending the complaint or become the basis of recovery.

Contracts—Breach—Partial Recovery—Remedies.

3. A party who stops short of full performance of an entire contract cannot sue upon a *quantum meruit* for any part of the work done; after full performance, however, he may sue upon the contract and state his cause of action in different counts to meet the exigencies of the case, or upon a *quantum meruit* alone.

[As to when complete performance is essential to a cause of action *ex contractu*, see note in 59 Am. St. Rep. 277.]

Same—Partial Performance—Recovery on *Quantum Meruit*, When.

4. Where departures from the stipulations of a contract are not substantial or intentional, and do not affect the entire result, the party at fault may recover on a *quantum meruit*, defendant being recompensed for all damages sustained by him because of plaintiff's delinquency.

Same—Fraud—Election of Remedies—Estoppel.

5. A party who has been induced to enter into a contract by false representations and, upon making an effort to perform it, discovers that, by reason of conditions actually existing, substantial performance is not possible, may repudiate it and recover for the value of services actually rendered; if he does not elect to repudiate it but does elect to abide by its terms, he is estopped thereafter to allege misrepresentations as a ground for avoiding his obligations under them, and may recover thereafter on a *quantum meruit* only upon a showing of substantial performance under the rule declared in paragraph 4, *supra*.

[As to mode and necessity of pleading estoppel, see note in 27 Am. St. Rep. 344.]

Same—Fraud—Continued Performance—Ratification.

6. Where performance in part has been accomplished before discovery of the fraud which induced plaintiff to enter into a contract, and repudiation of it is impracticable, a continuance of performance will not be held a ratification precluding relief independently of the contract.

[As to burden of proving fairness of transaction, see note in Ann. Cas. 1912A, 704.]

Pleading and Practice—Theory of Case.

7. A party, when bringing an action, must so frame his pleadings as to present some definite and certain theory upon which he predicates his prayer for relief; on appeal he will be held bound by the position thus assumed in the trial court, even though it be an erroneous one.

Contracts—Part Performance—*Quantum Meruit*—Evidence—Insufficiency.

8. Evidence in an action to recover the value of services rendered under a contract to plow and sow certain lands, held not to show a substantial performance of the contract or that plaintiff's omissions and departures from its terms were unintentional or so inconsequential as not to affect the entire result; hence he was not entitled to recover under the rule announced in paragraph 4, *supra*.

Same—Substantial Performance—Jury Question.

9. Whether or not a contract has been substantially performed is usually a question for the jury to determine.

Same—Difficulty in Performance—Effect.

10. Difficulty encountered by the obligor whereby the performance of a contract cannot be accomplished without greater expense than contemplated by him, is not alone sufficient to justify him in abandoning his obligation or stopping short of a full and substantial discharge thereof.

Same—Performance to Satisfaction of Obligees—Meaning of Clause.

11. Under a clause of a contract providing that the work called for shall be done to the satisfaction of the obligee, payment may not be capriciously refused on the ground that it is unsatisfactory, the requirement being met if the work be done in such a way as to be satisfactory to a reasonable person acting in good faith.

Same—View of Premises by Jury—Effect.

12. The fact that the jury had visited and examined the land in controversy before rendering their verdict in favor of plaintiff, was not

sufficient to overcome the import of the statements and admissions of plaintiff and his witnesses as to the defective character of a work for which compensation was claimed.

New Trial—Hearing by Judge Other Than Trial Judge.

13. The office of a district judge called in to determine a motion for a new trial in a cause heard by another judge was to decide whether the evidence as disclosed by the record, unaided by a recollection of the incidents of the trial, including a view of the witnesses, was sufficient to justify the verdict, and where the preponderance of the evidence thus viewed was decidedly against the conclusion reached by the jury, it was error to refuse a new trial.

[As to authority of successor to trial judge to pass upon motion for new trial, see note in Ann. Cas. 1914B, 1235.]

Appeal from District Court, Fergus County; C. C. Hurley, Judge of the Seventh Judicial District, presiding.

ACTION by Harry C. Waite against C. E. Shoemaker & Co. Judgment for plaintiff, and defendant appeals from an order denying its motion for a new trial. Reversed and remanded.

Messrs. Belden & De Kalb, for Appellant, submitted a brief; *Mr. H. L. De Kalb* argued the cause orally.

Plaintiff relied upon the written contract, and was thereby precluded from charging misrepresentation. Misrepresentation in the inception of a contract unquestionably entitles a party to avoid the contract; but he cannot stand upon the contract and at the same time say there is no contract because of fraud in its inception. The positions are inconsistent. One cannot assert both. (1 Page on Contracts, sec. 131.) Fraud in the inducement simply operates to make a contract voidable and not void, and the party claiming to have been defrauded makes the contract valid by electing with full knowledge of the facts to treat it as valid. (*Id.*, sec. 139.) Ratification may be evidenced in many ways, and is evidenced by the bringing of suit on the contract. (*Conrow v. Little*, 115 N. Y. 387, 5 L. R. A. 693, 22 N. E. 346; *Merrill v. Merrill*, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392; *Wainwright v. Weske*, 82 Cal. 193, 23 Pac. 12; *Downer v. Smith*, 32 Vt. 1, 76 Am. Dec. 148; Page on Contracts, sec. 131; *Herbert v. Wagg*, 27 Okl. 674, 117 Pac. 209; *Mundt v. Simpkins*, 81 Neb. 1, 129 Am. St. Rep. 670, 115 N. W. 325.)

Complete performance is essential to cause of action *ex contractu*. (*Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *Stark v. Parker*, 2 Pick. 267, 13 Am. Dec. 425; *McMillan v. Vanderlip*, 12 Johns. 165, 7 Am. Dec. 299; *Simonton v. Kelly*, 1 Mont. 363; *Ryan v. Dunphy*, 4 Mont. 342, 1 Pac. 710; *Riddell v. Peck-Williamson H. & V. Co.*, 27 Mont. 44, 69 Pac. 241.)

The testimony shows that there was not a performance of the terms of the contract, and it affirmatively shows that the respondent failed to substantially perform the conditions thereof. (See *Franklin v. Schultz*, 23 Mont. 165, 57 Pac. 1037; *Elliott v. Caldwell*, 43 Minn. 357, 9 L. R. A. 52, 45 N. W. 845; *Spence v. Ham*, 163 N. Y. 220, 51 L. R. A. 238, 57 N. E. 412; *Nesbit v. Braker*, 104 App. Div. 393, 93 N. Y. Supp. 856; *Viles v. Barre etc. Traction Co.*, 79 Vt. 311, 65 Atl. 104; *Manning v. Ft. Atkinson School Dist. No. 6*, 124 Wis. 84, 102 N. W. 356.) He tried to prove substantial compliance and failed.

The proportion that the value of the unfinished or defective work bears to the whole contract price has been considered in many cases as a basis for determination whether the contract has been substantially performed or not. (See *Flaherty v. Miner*, 123 N. Y. 382, 25 N. E. 418; *Excelsior Terra Cotta Co. v. Harde*, 90 App. Div. 4, 85 N. Y. Supp. 732; *Rochkind v. Jacobson*, 126 App. Div. 357, 110 N. Y. Supp. 583.) The question is sometimes a question of law. (*Rochkind v. Jacobson*, 126 App. Div. 357, 110 N. Y. Supp. 583.)

Plaintiff is not permitted to rely upon an excuse after alleging full performance. The alleged excuse was immaterial under the only possible theory of plaintiff upon which the case was tried, after the introduction of the contract in evidence. (*Peek v. Steinberg*, 163 Cal. 127, 124 Pac. 834; *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867; 9 Cyc. 747; *Walsh v. Hyatt*, 74 App. Div. 20, 77 N. Y. Supp. 8, 176 N. Y. 550, 68 N. E. 1125; *Young v. Stickney*, 46 Or. 101, 79 Pac. 345; *Neuberger v. Robbins*, 37 Utah, 197, 106 Pac. 933.) Having put himself in the position of being obliged to rely upon the written contract, and having failed to sustain by sufficient evidence a claim for a *quantum meruit*, he was in

exactly the same position as though it were eliminated from the controversy. (*Hunt v. Tuttle*, 125 Iowa, 676, 101 N. W. 509; *Wade v. Nelson*, 119 Mo. App. 278, 95 S. W. 956; *Fordtran v. Stowers*, 52 Tex. Civ. App. 226, 113 S. W. 631; *Pettibone v. Lake View Town Co.*, 134 Cal. 227, 66 Pac. 218; *Manning v. School District*, 124 Wis. 84, 102 N. W. 356; *Davis v. Chase*, 159 Ind. 242, 95 Am. St. Rep. 294, 64 N. E. 88, 853.)

Plaintiff's case was wholly insufficient in law when he finished, for he had not shown what it would cost to remedy the omissions. (*Spence v. Ham*, 163 N. Y. 220, 51 L. R. A. 238, 57 N. E. 412; *Mitchell v. Caplinger*, 97 Ark. 278, 133 S. W. 1032; *Evans v. Howell*, 211 Ill. 85, 71 N. E. 854; *Dugue v. Levy*, 114 La. 21, 37 South. 995; *Lambert v. Jenkins*, 112 Va. 376, Ann. Cas. 1913B, 778, 71 S. E. 718; *Manning v. School District*, 124 Wis. 84, 102 N. W. 356.) Plaintiff did not show the value of the work actually done. He contented himself with showing the reasonable value of plowing, harrowing and seeding land in that vicinity, but left the question open as to how much value in services had been rendered defendant by his misguided efforts. The record is devoid of any such evidence. (*Gillis v. Cobe*, 177 Mass. 584, 59 N. E. 455; see, also, *Barber Asphalt Pav. Co. v. Loughlin*, 44 Tex. Civ. App. 580, 98 S. W. 948; *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 120 Wis. 1, 97 N. W. 515.)

Performance was not made to the satisfaction of the defendant. This subject is one which has received considerable attention from the courts. Two general rules may be adduced from the authorities: (1) Where the service to be performed is to be done to the satisfaction of the adversary party, and concerns a matter of taste or fancy, the adversary may exercise his choice arbitrarily, and his determination is final. (2) With the same provisions in the contract, if the service is such as does not involve taste or matters of fancy, the courts hold that the decision cannot be made arbitrarily, but must be made honestly and have some basis in fact. (3 Page on Contracts, sec. 1390.)

It cannot be said that defendant's decision was arbitrary in this case. It had the right to expect performance of the con-

tract. It had reasons for honest dissatisfaction. (3 Page on Contracts, 2160; *Adams etc. Works v. Schnader*, 155 Pa. 394, 35 Am. St. Rep. 893, 26 Atl. 745; *Barrett v. Raleigh etc. Coke Co.*, 51 W. Va. 416, 90 Am. St. Rep. 802, 41 S. E. 220; *Osborne & Co. v. Francis*, 38 W. Va. 312, 45 Am. St. Rep. 859, 18 S. E. 591.)

Mr. Wm. M. Blackford and *Mr. Chas. J. Marshall*, for Respondent, submitted a brief; *Mr. Blackford* argued the cause orally.

The evidence shows the delay of performance of the work was caused largely by the acts of appellant. This excused performance by respondent beyond the agreed period of completion. (*Weeks v. Little*, 89 N. Y. 569; *King Iron Bridge etc. Co. v. City of St. Louis*, 43 Fed. 768, 10 L. R. A. 826; *Dumke v. Puhlman*, 62 Wis. 18, 21 N. W. 820; *United States v. Peck*, 102 U. S. 64, 26 L. Ed. 46; *Dannat v. Fuller*, 120 N. Y. 554, 24 N. E. 815; *Griffin v. American Gold M. Co.*, 123 Fed. 286, 59 C. C. A. 301; *Wolf v. Marsh*, 54 Cal. 228, 3 Morr. Min. Rep. 204; *American Paper Bag Co. v. Van Nortwick*, 52 Fed. 752, 3 C. C. A. 274; *Smith v. Barber*, 153 Ind. 329, 53 N. E. 1014; *Starr v. Gregory Con. M. Co.*, 6 Mont. 487, 13 Pac. 195.)

Appellant complains of Instruction No. 5, in that the trial court after having charged the jury that a substantial compliance by the plaintiff with the contract in doing the work was required, further said: "That the work should be done in a manner satisfactory to a reasonable person." Notwithstanding the contract provides that the work should be done to the satisfaction of the defendant, the trial court undoubtedly stated the correct rule as applicable to a plowing and seeding contract in its charge to the jury, that it was sufficient if the work done was satisfactory to a reasonable person. "A stipulation in a contract to perform to the satisfaction of one of the parties only calls for such performance as should be satisfactory to a reasonable person." (*Gladding, McBean & Co. v. Montgomery*, 20 Cal. App. 276, 128 Pac. 790; *Keeler v. Clifford*, 165 Ill. 544, 46

N. E. 248; *Doll v. Noble*, 116 N. Y. 230, 15 Am. St. Rep. 398, 5 L. R. A. 554, 22 N. E. 406; *Bowery Nat. Bank v. Mayor*, 63 N. Y. 336; *Schliess v. City of Grand Rapids*, 131 Mich. 52, 90 N. W. 700; *Carpenter v. Virginia-Carolina Chem. Co.*, 98 Va. 177, 35 S. E. 358; *Anderson v. Frye & Bruhn*, 69 Wash. 89, 124 Pac. 499; *Barnett v. Sweringen*, 77 Mo. App. 64; *Electric Lighting Co. v. Elder*, 115 Ala. 138, 21 South. 983.)

In *Blankenship v. Decker*, 34 Mont. 292, this court had this to say upon this question: "Upon a complete performance of an express contract for services, at a stipulated compensation, there seems to be no sound reason why a recovery may not be had upon the *quantum meruit*." And the court afterward affirmed this doctrine. (*Neuman v. Grant*, 36 Mont. 77, 92 Pac. 43.) "When one performs services for another on a special contract, and for any reason, except a voluntary abandonment, fails to fully comply with his contract, and the service and material have been of value to him for whom they were rendered and furnished, he may recover for such material and services their reasonable value, after deducting therefrom any damages the party for whom such materials were furnished and services were rendered has sustained by reason of such failure." (*Gove v. Island City Merc. etc. Co.*, 19 Or. 363, 24 Pac. 521; *Steeple v. Newton*, 7 Or. 110, 33 Am. Rep. 705; *Stillwell etc. Mfg. Co. v. Phelps*, 130 U. S. 520, 32 L. Ed. 1035, 9 Sup. Ct. Rep. 607; *Katz v. Bedford*, 77 Cal. 319, 322, 1 L. R. A. 826, 19 Pac. 523; *Trowbridge v. Barrett*, 30 Wis. 661; *Woodward v. Fuller*, 80 N. Y. 312; *Heckmann v. Pinkney*, 81 N. Y. 211; *Hayward v. Leonard*, 7 Pick. 181, 19 Am. Dec. 268; 9 Cyc. 685.)

Where one has performed work in good faith, though not exactly in the manner or within the time prescribed by the contract, and it has been accepted, he may recover its reasonable value under the common counts in *assumpsit*. (*Standard Gas-light Co. v. Wood*, 61 Fed. 74, 9 C. C. A. 362; *Columbus Safe Deposit Co. v. Burke*, 88 Fed. 630, 32 C. C. A. 67; *Orem v. Keelty*, 85 Md. 337, 36 Atl. 1030.) "The fact that work was defectively done is no defense to an action to recover the con-

tract price, except by way of recoupment of damages sustained by the defendant by reason of the defects, and to get the benefit of this defense he must allege and prove his damages according to the rules by which such damages are measured." (9 Cyc. 687, par. 3; *Sheppard v. Dowling*, 103 Ala. 563, 15 South. 846; *Wadleigh v. Town of Sutton*, 6 N. H. 15, 23 Am. Dec. 704; *Veazie v. Bangor*, 51 Me. 509.)

The respondent at the time of entering into the contract did not know of the gravelly and rocky condition of portions of the ground, while appellant did know it, and strict performance therewith by respondent as to such portions was excused. "Where the party making the representation has had means and opportunities to know the facts concerning the subject matter of the contract, which the other party has not had and cannot have without going to the expense and delay of an investigation of matters at a distance, we see no reason why he may not rely upon such representations of fact. In our opinion, the party making such representations cannot be heard to say: 'Their falsity might have been known by an investigation of the facts, and had the other party not been so credulous as to rely upon my representations, he would not have been deceived.' " (Bigelow on Fraud, 67; 9 Cyc. 429, 430; *Hingston v. Smith Co.*, 114 Fed. 296, 52 C. C. A. 206; *Hicks v. Stevens*, 121 Ill. 186, 11 N. E. 241; *Hale v. Philbrick*, 42 Iowa, 81; *Faribault v. Sater*, 13 Minn. 210 (223); *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 380, 381; *Stewart v. Stearns*, 63 N. H. 99, 56 Am. Rep. 496; *Cottrill v. Krum*, 100 Mo. 397, 18 Am. St. Rep. 549, 13 S. W. 753; *Dambmann v. Schulting*, 75 N. Y. 55; *Clark v. Ralls* (Iowa), 24 N. W. 567; 1 Page on Contracts, sec. 121.)

Whether a contract has been substantially performed is a question of fact to be determined from the facts and circumstances in the case, and the finding of the trial court thereon is conclusive as upon any other question of fact. (*Harlan v. Stufflebeem*, 87 Cal. 508, 25 Pac. 686.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action to recover of the defendant corporation the value of services alleged to have been rendered to it by the plaintiff. The cause was tried by Hon. E. K. Cheadle, sitting with a jury, which returned special findings and a general verdict for plaintiff for \$1,774.25. Judgment was entered for this amount and costs. Judge Cheadle having thereafter, and prior to the submission of defendant's motion for a new trial, retired from office, and Hon. Roy E. Ayers, his successor, being disqualified by reason of interest, the motion was heard and determined adversely to defendant by Hon. C. C. Hurley, judge of the seventh district. The appeal is from the order denying the motion.

On August 18, 1911, the plaintiff entered into a written contract with the defendant, of which, omitting formal recitals, the following is a copy: "It is hereby agreed that the party of the first part (plaintiff) is to plow, work down, and sow to winter wheat all that part of the following described land, which is now under cultivation: [Here is described the land belonging to the defendant, situate in Fergus county and consisting of one entire section.] This work to be commenced by the party of the first part within three days after notice by the party of the second part, and the entire job of plowing, working down, and seeding to be completed by September 15, 1911. It is agreed that the party of the first part is to so plow and work down the land above mentioned as to prepare a good seed bed, the plowing to be from four to six inches deep, with an average depth of at least four and one-half inches and a minimum depth of four inches, all the work to be done to the satisfaction of the party of the second part. It is agreed that all machinery and implements necessary to accomplish the work contemplated by this contract are to be furnished by the party of the first part at his own expense, but that the seed wheat is to be furnished on the ground by the party of the second part. It is agreed that the party of the first part is to receive as compensa-

tion for the work above described the sum of three and 50/100 dollars (\$3.50) per acre."

It is alleged in the complaint that all of the land described which was under cultivation at the time the contract was entered into consisted of 595 acres; that plaintiff, after notice by defendant, began the work, and diligently prosecuted it to completion, duly performing all the conditions of the contract; that he plowed, worked down and sowed to winter wheat 595 acres, completing the work on October 15, 1911; and that immediately thereupon there became due to him from the defendant, reckoning at the price of \$3.50 per acre, the sum of \$2,082.50, no part of which has been paid, though frequent demand for payment has been made. In a second count plaintiff seeks recovery upon a *quantum meruit*, alleging the reasonable value of his services to be \$2,082.50.

The answer, admitting the execution of the contract as alleged, denies that the plaintiff plowed any greater number of acres than 580; denies that he began to plow within the time specified in the contract; denies that the contract was executed according to its terms. In a further separate defense, by way of counterclaim, alleging full performance on its part, defendant sets forth various particulars in which the plaintiff failed to fulfill the contract, *viz.*: To begin the work at the time specified in the contract; to complete it by the time specified; to plow the land to the depth required, or to so work it down as to prepare a good seed bed, or to accomplish the work to the satisfaction of the defendant. It is alleged that, because of the failure of plaintiff to comply with the contract in the particulars above mentioned, and before the plowing had been completed or any seeding done, the defendant notified plaintiff to cease work and to leave the premises. It is further alleged that, by reason of plaintiff's delinquencies above alleged, the defendant was damaged in the sum of \$5,000. The answer to the *quantum meruit* count denies generally all the allegations therein, except that plaintiff made demand upon defendant for the payment of the sum claimed to be due. It further alleges a counterclaim for

damages in the sum of \$5,000 for failure of plaintiff to comply with the contract in the particulars enumerated in the counterclaim to the first count. Plaintiff's reply admits that he did not complete the work within the time specified in the contract, assigning as a reason therefor that the defendant withheld the premises so that he could not begin it earlier. He also admits that he did not plow all the land to the depth required, but alleges that he complied fully with the contract in this regard whenever it was not impossible to do so by reason of the rocky and stony character of the soil. He denies all the other allegations of both counterclaims. As a further general reply it is alleged, in substance, that at the time plaintiff entered into the contract with the defendant, he was wholly unacquainted with the character of the land of defendant, the subject of the contract; that defendant's agent represented to him that the land was stubble land which had previously all been plowed and cultivated; that it was not stony or rocky in character, but fine farming land, free from rocks and stone, and offering no obstacle to the accomplishment of the work which plaintiff undertook to do, whereas, in fact, large areas of it had never been plowed or cultivated, and was stony and rocky in character, by reason of which it was impossible for plaintiff to plow it to the required depth or to prepare it for seeding as in the contract provided, all of which made it impossible for him to comply with the terms of the contract in this behalf; that the defendant well knew that these representations were false, and were made for the purpose of inducing plaintiff to enter into the contract; and that plaintiff entered into it relying upon the representations so made to him, whereas, if the character and condition of the land had been disclosed to him, he would not have done so. It is alleged further that the defendant greatly delayed and hindered plaintiff in beginning and completing the work by failing to remove the crop then standing upon the land, and by leaving upon the land the straw from this crop, rendering it exceedingly difficult to plow the land at all; but that, notwithstanding these acts of the defendant and its false repre-

sentations, plaintiff entered upon the land as soon as he could, and continued diligently in the prosecution of the work to its completion in the best manner possible under the circumstances.

The sufficiency of the evidence to justify a verdict for the plaintiff in any amount was challenged by a motion for nonsuit, and also on the motion for a new trial. It is contended that it did not present a case for the jury, because, the contract being admitted, and it appearing without controversy that the plaintiff had failed in substantial particulars to perform it to the satisfaction of defendant, he cannot recover either upon the contract or upon a *quantum meruit*. It is also contended that, if it be conceded that when a party has been induced to enter into a contract by means of fraudulent representations, and has undertaken to perform, and has performed, it to the best of his ability under the circumstances as they are found to exist, he may by his allegations and proof avoid the contract altogether and recover the value of the services actually rendered, the evidence was insufficient to justify recovery on this theory.

The foregoing synopsis of the pleadings discloses a complete departure in the reply from the issues tendered by the complaint. No effort was made by motion or otherwise prior to or during the trial to eliminate the confusion in the issues arising out of this departure. Manifestly, if the plaintiff was induced [1] to enter into the engagement by fraud and misrepresentation by the defendant, there was no meeting of minds of the parties, with the result that there was no contract. Plaintiff could not declare upon the contract, and at the same time avoid it on the ground of fraud, and nevertheless recover upon proof of performance of it, either in whole or in part. His reply being inconsistent with the complaint, he must be held to have abandoned the cause of action upon the contract and have based his right to recover exclusively upon the theory that, having rendered to the defendant services of substantial value, the law cast upon it the obligation to pay for them. The reply, being merely responsive to matters alleged affirmatively in the answer, [2] cannot perform the office of amending the complaint, nor

itself become the basis of recovery. (*Thornton v. Kaufman*, 35 Mont. 181, 88 Pac. 796; *Manuel v. Turner*, 36 Mont. 512, 93 Pac. 808; 9 Cyc. 747.) If the allegations of the reply were true, the allegations of the first count in the complaint were manifestly untrue, with the result that the question whether the plaintiff performed the contract according to its terms was not a triable issue. Nor was there presented a triable issue under the second count upon the question whether the contract had been substantially performed. Judging from the instructions submitted to the jury, the court seems not to have noticed the incongruity disclosed by the pleadings, and to have proceeded upon the assumption that recovery might be had upon any one of three theories, according as the evidence tended to support any one of them, *viz.*: (1) Upon the count on the special contract, if, in the opinion of the jury, the evidence disclosed a substantial performance by the plaintiff so far as the result ought to be satisfactory to defendant as a reasonable person; (2) upon the *quantum meruit* count, if the evidence disclosed a like performance; or (3) upon the *quantum meruit*, though the result was unsatisfactory to the defendant, and it appeared that the contract was void on account of defendant's fraud by which it induced plaintiff to enter into it.

That the contract in question was entire is obvious. The intention of the parties, as is manifested by their written engagement, was that the defendant was not to become indebted to the plaintiff in any amount until the work had been completed to its satisfaction. No time being named when the consideration was to become due, the law made it due in its entirety upon full performance by the plaintiff. Full performance in all substantial particulars, to the satisfaction of the defendant, was a condition precedent to be fulfilled before plaintiff was entitled to demand payment of the stipulated price or any part of it. (*Riddell v. Peck-Williamson H. & V. Co.*, 27 Mont. 44, 69 Pac. [3] 241.) As long as an entire contract remains open—that is, unperformed—the party who has not done his part cannot sue upon a *quantum meruit* for any portion of the consideration.

The action will be defeated upon allegation and proof of the special contract and that plaintiff has stopped short of full performance. (*Riddell v. Peck-Williamson H. & V. Co.*, *supra*; *Gove v. Island City M. & M. Co.*, 19 Or. 363, 24 Pac. 521; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442.) When, however, the contract has been fully performed, the plaintiff may state his cause of action in different counts to meet the exigencies of the case as disclosed by the evidence, or he may sue upon a *quantum meruit* alone. (*Blankenship v. Decker*, 34 Mont. 292, 85 Pac. 1035.) Recovery upon the *quantum meruit* in such a case will not be defeated by proof of the special contract; on the contrary, nothing remaining but the duty to pay, the special contract is made the *quantum meruit* in the case. (*Blankenship v. Decker*, *supra*; *Neuman v. Grant*, 36 Mont. 77, 92 Pac. 43; *Metcalf Co. v. Gilbert*, 19 Wyo. 331, 116 Pac. 1017; *Shepard v. Mills*, 173 Ill. 223, 50 N. E. 709; *Burgess v. Helm*, 24 Nev. 242, 51 Pac. 1025; 5 Ency. Pl. & Pr. 323.)

There are exceptions to the general rule that a failure of full performance is conclusive of plaintiff's right to recover. These are cases in which the departures from the stipulations in the [4] contract are not substantial and intentional, and do not affect the entire result, and the defendant has received benefits which it would be unjust to permit him to retain without paying anything. This is particularly true of building contracts. In such a case the law implies a promise on the part of the adverse party to pay what the benefit is worth, and permits recovery for it upon a *quantum meruit*, provided the defendant may recoup all damages sustained by him by reason of plaintiff's delinquency. In such cases the parties cannot rescind and stand *in statu quo*, and it is but just that compensation should be made by the adverse party for the actual benefit received. The following cases, taken from among many cited in plaintiff's brief, support this doctrine: *Gove v. Island City M. & M. Co.*, *supra*; *Katz v. Bedford*, 77 Cal. 319, 1 L. R. A. 826, 19 Pac. 523; *Stillwell etc. Mfg. Co. v. Phelps*, 130 U. S. 520, 32 L. Ed. 1035, 9 Sup. Ct. Rep. 601; *Woodward v. Fuller*, 80 N. Y. 312; *Hayward*

v. *Leonard*, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; *Trowbridge v. Barrett*, 30 Wis. 661; *Walsh v. Jenvey*, 85 Md. 240, 36 Atl. 817, 38 Atl. 938. We think it is supported by the great weight of authority. As was said, however, in *Phillip v. Gallant*, 62 N. Y. 256: "There must be no willful or intentional departure, and the defects must not pervade the whole, or be so essential as that the object which the parties intended to accomplish—to have a specified amount of work performed in a particular manner—is not accomplished." (See, also, *Woodward v. Fuller*, *supra*, and *Sinclair v. Tallmadge*, 35 Barb. (N. Y.) 602.) To permit a plaintiff to recover, though it appears that he has willfully disregarded his engagement in essential particulars, would be for the law to encourage parties to be delinquent in the performance of their solemn engagements; whereas its policy is to compel observance of them. (*Clifton v. Willson*, 47 Mont. 305, 132 Pac. 424.)

We think it a proposition not open to dispute that, if a party has been induced to enter into a contract by false representations, and, upon making an effort to perform it, discovers that, by reason of conditions actually existing, substantial performance of it is not possible, he may repudiate it and recover for the value of services actually rendered. In such case it is not competent for the adverse party to say that he obtained the benefits by fraud, and not by contract, and that he will not pay for them. It seems equally beyond question that, if upon discovery of the fraud, the injured party does not elect to repudiate the contract, but does elect to abide by its terms, he must be held to have elected to be bound by them, and to be disabled thereafter from alleging misrepresentations as a ground for avoiding his obligations under them. He must then recover, if at all, upon a showing of substantial performance, or for substantial benefits conferred, under the exception to the general rule in the cases cited *supra*. (1 Page on Contracts, sec. 39; *Downer v. Smith*, 32 Vt. 1, 76 Am. Dec. 148; *Mundt v. Simpkins*, 81 Neb. 1, 129 Am. St. Rep. 670, 115 N. W. 325.) [6] If, however, performance in part has been accomplished before discovery of the fraud, and repudiation of the contract

is impracticable, a continuance of performance will not be held to be a ratification precluding relief independently of the contract. (*Sell v. Mississippi River Logging Co.*, 88 Wis. 581, 60 N. W. 1065.)

It is incumbent upon a party, when he brings an action, to [7] so frame his pleadings as to present some definite, certain theory upon which he predicates his relief. (*Herbert v. Wagg*, 27 Okl. 674, 117 Pac. 209; 21 Ency. Pl. & Pr. 649.) On appeal he will be held bound by the position assumed by him in the trial court, even though his position is erroneous. (*Talbott v. Butte City W. Co.*, 29 Mont. 17, 73 Pac. 1111; *State ex rel. Hickey v. District Court*, 42 Mont. 496, Ann. Cas. 1912B, 246, 113 Pac. 472.) He will not be heard to say that the court committed error in adopting the theory he assumed. The difficulty confronting us in this case, however, has been to ascertain upon what theory plaintiff predicated his right to recover. We have therefore directed our effort to ascertain whether the verdict ought to be sustained upon any theory which we can gather from the pleadings as we find them.

The evidence is so voluminous that we cannot within any reasonable [8] space set it forth and examine it in detail. The following is a summary narrative of what plaintiff's evidence tends to show: The land in question had never been plowed or cultivated until the year 1910. Plaintiff began work about the middle of September, 1911. The plowing was finished on October 11, and the seeding four days later. In all about 580 acres were plowed and seeded. The work was not done by plaintiff himself, but by others who owned machine plows, whose services he secured. It was understood by the parties when the contract was drawn that, to work down the land in order to make a good seed bed, it was necessary to follow the plows with harrows and floats. There is no controversy but that the phrase "to work down" included harrowing and leveling. These floats consisted of heavy planks so connected together as to form drags, which were drawn by the plow engines following the plows, to smooth the surface and make it even. The floats were discarded during

the course of the work, and were not used at all on 375 acres. The cost of the use of them was twenty-five cents an acre. According to one of plaintiff's witnesses, both harrows and floats were discarded. The reason assigned for doing this was that to use them tended to pile up the plowed ground and to make lumps or ridges upon the surface. The reasonable value of plowing and working down with floats and harrows and seeding was \$3.50 an acre. Two per cent of the ground was not plowed at all. Seventy-five acres were not capable of being plowed to the depth required by the contract. These portions were not plowed to any appreciable depth. This was due to the nature of the ground, which was traversed in places by stony and gravelly ridges. It would be difficult under any circumstances to plow these portions to meet the requirements of the contract. The plows did not go down on the land where the stubble had not been burned to a depth greater than three and one-half or four inches. Plaintiff stated: "Before entering into the contract I had a conversation with Mr. Shoemaker [president of defendant] in reference to this plowing. Mr. Shoemaker told me that the land was well plowed, that it was as good a piece of plowland as there was in this county. I said to him: 'I haven't got time to examine it, and will have to take your representations, Mr. Shoemaker. How about the rock?' He said the rock had been taken off, there was practically no rock on it. 'Was it well plowed last year?' 'Yes, sir,' he says, 'there was an elegant job of plowing on it last year.' * * * When I entered upon the ground to complete this contract with the Shoemaker Company I found that the original plowing (the plowing done the year before) was very shallow and very poor in a good many places on this land. It had been plowed once before; just been broke. With reference to the stony or rocky portion of the land, I found that there were many streaks or ridges containing quantities of rock and gravel—a sort of hardpan; also found on the northwest corner of the section a considerable piece that had never been plowed. I can't tell the reason why, with the exception that there are lots of rock on it—worlds of rock on it.

With reference to the gravel on these rocky ridges through the land, I will say that there was considerable gravel and surface rocks in these streaks they went through. The gravel was right at the surface. These rocky ridges, some of them went clear across, and some of them diagonally cutting across the corner."

Thomas Vickery, who was in charge of one of the two plow machines, stated that one-half of the area plowed by his machine—415 acres—was plowed two and one-half inches deep, and the other half to the depth of six inches. Another witness who was employed by Vickery stated that one-half the land was so stony that it could not be plowed. On two-thirds of the other half the plow went down to a depth of five or six inches; while on the other one-third it went down to a depth of from three and one-half to five inches. On some of the land the stubble was not turned under.

Thomas Chaney, who was in charge of another machine which plowed about 180 acres, said the plowing done by his machine would average from two and one-half to eight inches; one-third of this area was rocky and gravelly, and could not be plowed well. The average depth reached by his machine was nearly four and one-half inches.

Marion Maury did the seeding. Bert Grose, who was employed by him, expressed the opinion that 70 acres were neither plowed nor drilled, and that there were 550 (?) acres that would be considered a good job of plowing and drilling.

Stephen Anderson, also employed by Vickery, stated that, in his opinion, one-third of the ground was not properly plowed. The reason why the plowing was not better upon the portion plowed by Vickery was that it was stony and gravelly. The rest of it was plowed to the depth of four, four and one-half and five inches.

Roy L. McDonald, a practical farmer and disinterested witness who examined the land the week before the trial, stated that in places it was so gravelly that it could not be well plowed at the season of the year (in September) the plowing was done. Nearly one-third had not been plowed deeper than two inches;

otherwise a good job had been done by the plaintiff. On this area, he said, he did not think a better job could have been done.

Besides giving the excuse that the ground could not be plowed to meet the requirements of the contract because of its stony and gravelly character, plaintiff introduced evidence to show that he was hindered in completing the work, and prevented from plowing to the depth required, by stubble and straw left upon the ground by the harvesting machine which the plows followed. It appears that in many places this was burned off by those engaged in plowing, while in others it was not. The impediment furnished by it was also assigned as a reason the use of the floats and harrows had been abandoned. On or about September 30 Mr. Shoemaker went upon the ground to observe how the work was being done, having learned that it was not being done as required by the contract. The plaintiff and others were present. Recounting the conversation which occurred at that time, the plaintiff said: "After he had told me he would not pay a nickel for the work that was done, in the presence of four or five others, I said, 'I don't know what I will do about it.' He says, 'I don't care, Mr. Waite, what you do about it; I won't pay a nickel for it.' The others turned around and walked away. Mr. Shoemaker and I walked ahead, and he kept calling my attention to the shallowness of the plowing. He says, 'You can see it doesn't run four and one-half inches deep'; and he says, 'I won't pay a nickel for it.' 'Well,' I says, 'then I have made up my mind just what I will do. I will go over there and tell both these rigs to get off here.' He says, 'No; don't do that; go over and tell them to replot it; make them replot it for you.' 'Well,' I says, 'I will attend to it some way'; and we left. In that conversation there was nothing said that if the rest of it was plowed it would have to be plowed according to the terms of the contract, if I expected to get my money; nothing further than what I have testified to; that is all. There never was any complaint made to me because the work was not done on time."

After the work was completed and plaintiff made demand for payment, the refusal by the defendant was put upon the ground that plaintiff had failed to observe the requirements of the contract. The seeding was begun on, October 9 and finished on October 15. The defendant had theretofore delivered the seed upon the ground where it was lying in sacks. Prior to the beginning of this part of the work, and on October 4, plaintiff made inquiry of Mr. Shoemaker by 'phone concerning the use of it. Shoemaker then told him, in effect, not to go forward with the seeding, saying: "If you seed that ground you do it at your peril." The conversation discloses that the reason for this statement was that Shoemaker was dissatisfied because the land had not been prepared as required by the contract. There was other evidence showing that Mr. Shoemaker had expressed to plaintiff dissatisfaction with the way in which the work had been done.

Defendant's evidence did not in any way aid plaintiff's case. On the contrary, it tended to emphasize the admitted defaults of the plaintiff. It also controverted strongly plaintiff's evidence to the effect that portions of the cultivable land had not been well broken the previous year. There was evidence showing that, while it was new or sod land, it had been plowed for the first time the year before, and had all been well plowed once, and portions of it twice. The crop produced showed an average of twenty bushels to the acre. There was also evidence tending to show that within a week prior to the trial, which occurred in the early part of May, 1912, the witness Hart, who had done the plowing in 1910, at the instance of the defendant, plowed portions of the land which plaintiff had identified as so stony and gravelly that they could not be plowed. As to the difficulty encountered in breaking the sod in 1910, this witness stated: "I did not find anything there that impeded or tended to impede the work I contracted to do, any more than there was a couple of little ridges that had a little gravel on them; probably might have been three acres in the two ridges." His testimony showed that his con-

tract for breaking the sod covered 300 acres. His statement was illustrated by several photographs taken soon after the plowing done just previous to the trial, and tended strongly to establish the fact that the portions of the land which plaintiff claimed could not be plowed had been plowed by him to the depth of from six to twelve inches. He was corroborated materially by other witnesses, and was not directly contradicted by any. The circumstances under which this plowing was done were shown to be not materially different from those existing at the time plaintiff did the work. Several of the photographs introduced tended to show that in many places the plowing done by the plaintiff was not of sufficient depth to uproot the stubble left from the crop of the previous year. There was evidence by several witnesses that in many places the stubble had not been disturbed. Comparative measurements were also made of the depth to which Hart plowed the ground, and the depth to which plaintiff had plowed the same ground the fall before. There was little evidence of substantial character introduced tending to show the condition of the crop which had been sown by the plaintiff. The photographs indicated that at the time the plowing was done and the measurements made there was no visible appearance of a growing crop. So far as there was any evidence on the subject, it served rather to show that the crop would prove a substantial failure. Defendant did not notify plaintiff when he should begin the work. The machines were started as soon as the harvesting had sufficiently advanced to permit this to be done. No complaint was made until the defendant filed its answer in this case that the work was not completed within the required time. By his own admissions plaintiff knew when he entered into the contract that the land was covered with such straw and stubble as would be left upon it during the course of harvesting. All evidence as to these matters we deem immaterial to consider, in the light of the other evidence and the admissions of the parties, express or implied. It does not tend to

establish any substantial breach of the contract or fraud by which plaintiff was deceived to his prejudice.

Whether or not there has been a substantial performance of [9] a contract is usually, of necessity, a question for the jury (*Phillip v. Gallant, supra*), for the reason that the conclusion must be drawn from conflicting statements and opinions of witnesses. In this case, however, viewing the evidence as a whole, there is no substantial conflict in the statements of the plaintiff and his witnesses, as among themselves, or in their statements, when compared with those of the defendant, except as to the extent of plaintiff's omissions. The question is therefore: Does the evidence, giving it its full probative value, establish a substantial performance of the contract, or that plaintiff's omissions and departures from its terms were unintentional and so inconsequential as not to affect the entire result? Plaintiff knew when he entered into the contract that he was to plow, work down and seed all the cultivable land. These three things were by the parties deemed to be, and were, essential; for all were necessary steps to be taken in order that the defendant might realize the result which he could ordinarily expect at the end of the season—viz., a crop of grain. The contract required all the ground to be plowed to a minimum depth of four inches. By plaintiff's own showing it definitely appears that one-half of the area gone over by Vickery could not be plowed, and therefore was not plowed, and that a portion of the rest—one-third—was not plowed to the minimum depth. Of the area plowed by Chaney, one-third was not plowed well, because it was rocky and gravelly. Over a substantial portion of this area the minimum depth was not maintained. The "working down" was entirely omitted on 375 acres—more than one-half of the whole area. The seeding was not done at all on seventy acres. It is entirely competent for one to contract to do a difficult piece of work in a particular way. The fact that it is discovered to be more difficult than was anticipated is no reason why the engagement to accomplish it should not be observed. Aside from any rep-

representations made to him by the obligee upon which he was [10] entitled to rely, and by which he was misled to his prejudice, the difficulty of performance encountered by the obligor whereby performance cannot be accomplished without greater expense, destroying the prospect of profit for him, is not a sufficient reason to justify an abandonment of his obligation or to stop short of a full and substantial discharge of it. He is not therefore authorized to substitute his judgment, as to what ought to be accepted as a fulfillment of the contract, for what the contract itself calls for. If the contract is entire, as here, and the obligee must accept such benefits as inure from the part performance, whether he wills to do so or not, he cannot be held liable for any part of the consideration. (Rev. Codes, sec. 4926; *Riddell v. Peck-Williamson, H. & V. Co., supra.*) When, therefore, the default is admitted, the burden rests upon the obligor to avoid the consequences of it at the peril of defeat.

The evidence, as summarized above, does not show a substantial performance; on the contrary, it discloses affirmatively such deviations from the requirements of the contract as to justify the conclusion that, upon the discovery by him that it would be difficult and expensive to do what he had agreed to do, the plaintiff made up his mind to act upon his own judgment as to what he ought to do under the conditions found to exist, without reference to the provisions of the contract. The departures were therefore willful and intentional, and pervaded the whole performance in particulars made essential, not only by the terms of the contract, but by the purpose for which the work was to be done. Therefore the findings of the jury cannot be sustained upon the theory that the contract was substantially performed; nor can they be sustained under the *quantum meruit* count, either upon the theory that there was a substantial performance, or on the theory that benefits accrued to the defendant which it voluntarily accepted and ought to pay for. It was left in the position of being compelled to accept the result, however unsatisfactory it was, and

without reference to what the result might be. When the work was about half finished, the president of the defendant emphatically expressed to the plaintiff his dissatisfaction with it, and, while he urged him not to abandon it, at the same time he asserted that he would not pay for what had been done; and when the time for seeding came he warned the plaintiff that the seeding of the land in the condition of preparedness it was then, would be at the peril of the latter. To be sure, the defendant could not capriciously refuse to pay on the ground [11] that the result was unsatisfactory. All that it could require under the clause of the contract providing that the work should be done to its satisfaction was that it should be done in such a way as to be satisfactory to a reasonable person acting in good faith. (*McCrimmon v. Murray*, 43 Mont. 457, 117 Pac. 73; *Hawkins v. Graham*, 149 Mass. 284, 14 Am. St. Rep. 422, 21 N. E. 312.) Even under this rule, however, we do not think the evidence justified the conclusion that the defendant ought to have been satisfied with the result. Nor do we think the evidence sufficient to justify the conclusion that the plaintiff was misled to his prejudice by the statement of Shoemaker as to the condition of the land. Let it be conceded that Shoemaker's statements as detailed by the plaintiff were false, and that for this reason the plaintiff did not make any effort to ascertain what the actual conditions were. According to his own statement, he did ascertain them when he entered upon the land to begin work. When he found out the conditions he was at liberty either to repudiate the contract or to ratify it and proceed to perform it. There is nothing in the evidence tending to show that he could not have repudiated it without loss, and therefore the conclusion must follow, it seems to us, that he chose the latter alternative, which carried with it the assumption of the burden imposed by it. Such prejudice and loss as he suffered by doing the work as he did, after he ascertained the conditions and had been plainly told he would not be paid for it, he voluntarily brought upon himself.

Nor do we think it is shown by a preponderance of the evidence that it was impossible to plow the entire cultivable area to the depth stipulated in the contract, so that plaintiff may justify his default on this ground. On the contrary, the preponderance is against the conclusion that the plowing was impossible. If, upon entering upon the land, plaintiff ascertained that it was not possible to perform the contract as required, he was at liberty to repudiate it and recover for services already rendered (Page on Contracts sec. 1363); he was not at liberty, however, to continue the work, and then insist that the defendant should pay for the result in its defective form, as a substantial performance of the contract.

In the consideration of the evidence we have not overlooked [12] the fact that the jury visited and examined the land in controversy. The result of their observations, whatever they were, cannot serve to overcome the import of the statements and admissions of plaintiff and his witnesses as to the character of the work done. The judge who determined the motion did so upon the dead record, unaided by a recollection of the incidents of the trial including a view of the witnesses. His office was to [13] determine whether, as disclosed by the record, the evidence was sufficient to justify the findings and verdict. (*Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76.) We think he erred in holding that it was, and that defendant is entitled to a new trial.

Errors are assigned on rulings, during the trial, upon questions of evidence, and also upon certain of the instructions to the jury. The objections made to the evidence were upon grounds not tenable, and were properly overruled. The foregoing discussion renders consideration of the instruction unnecessary.

The cause is remanded to the district court, with directions to grant the defendant a new trial.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. MARSHALL ET AL., RELATORS, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,608.)

(Submitted January 15, 1915. Decided February 16, 1915.)

[146 Pac. 743.]

Prohibition—Remedy by Appeal—Mandamus—Discretion—Nurses—Regulation of Business—Power of State—Due Process of Law—Administrative Agencies—Appeal Procedure.

Prohibition—Remedy by Appeal—“Speedy and Adequate.”

1. Where immediate injury or mischief might follow an attempt to exercise the right of appeal in a proceeding in which the district court, in alleged excess of jurisdiction, is about to enter a decree awarding a peremptory writ of mandate, the remedy is neither so speedy nor adequate as to bar the granting of a writ of prohibition under section 7228, Revised Codes.

[As to when the writ of prohibition lies, see notes in 12 Am. Dec. 604; 18 Am. Dec. 238; 111 Am. St. Rep. 929.]

Mandamus—Nurses—Board of Examiners—Discretion.

2. The duty imposed by Chapter 50, Laws of 1913, upon the State Board of Examiners for Nurses to examine persons who seek registration as professional nurses and judge of their qualifications, is *quasi* judicial, and its performance in any particular way cannot, therefore, be compelled by *mandamus*. Where, however, its discretion has been abused or arbitrarily or capriciously exercised, the writ does lie to compel a proper exercise of the powers granted.

[*Mandamus* to compel performance of a public duty at instance of private person, see note in 7 Am. St. Rep. 484.]

Same—Extent of Relief—Prayer.

3. Where a petitioner for a writ of mandate prays for something he is not entitled to, the court may nevertheless grant whatever mandatory writ might be appropriate under the petition and the proof.

Same—Registration of Nurses—Regulation of Profession—Due Process of Law.

4. *Held*, that Chapter 50, Laws of 1913, requiring registration of professional nurses, is not unconstitutional as depriving, without due process of law, nurses not registered of the right to follow a lawful business or calling, since the Act expressly provides that it does not apply to gratuitous nursing nor to any person nursing for hire who does not pretend to have special training and to be a registered nurse.

Same—“Due Process of Law.”

5. By “due process of law” is not meant necessarily judicial process.

[As to what is due process of law, see notes in 24 Am. Dec. 538; 20 Am. St. Rep. 554.]

Same—Regulation of Profession—Administrative Agencies.

6. The process of administration of the provisions of an Act regulating a profession or calling may be committed to any agency the legislature chooses to select, *i. e.*, to individuals, corporations or voluntary

associations; hence the fact that the State Association of Graduated Nurses, to which an appeal may be taken from the decision of the State Board of Nurse Examiners refusing to recommend registration, is a voluntary association does not render that section objectionable.

Same—Regulation of Profession—Appeal Procedure.

7. In the absence of provisions prescribing the procedure on appeal from a decision of the State Board of Examiners for Nurses, Chapter 50, *supra*, implies such orderly procedure as will enable the appellate body to fairly determine the right of appellant to registration.

Original application for a writ of prohibition by the State, on the relation of Lucy A. Marshall, M. M. Hughes and others, as the Montana State Board of Examiners for Nurses, against the District Court of the Thirteenth Judicial District in and for the County of Yellowstone, and George W. Pierson, a Judge thereof. Writ issued.

Mr. D. M. Kelly, Attorney General, and *Messrs. Loud, Collins, Campbell, Wood & Leavitt*, for Relators, submitted a brief; *Mr. Sterling M. Wood* and *Mr. Donald Campbell* argued the cause orally.

Mr. F. B. Reynolds, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Original application on the relation of Lucy A. Marshall and four other persons, constituting the Montana State Board of Examiners for Nurses, for a writ absolute to prohibit the district court of Yellowstone county and the Hon. George W. Pierson, one of the judges thereof, from taking any further steps in a certain *mandamus* proceeding now pending before said court. The material facts are as follows: On January 2, 1914, one Ellen M. Woolsey filed with the relators her application for examination and registration under the provisions of Chapter 50, Session Laws of 1913. She was then over the age of twenty-one years and of good moral character, she had graduated from a correspondence school of nursing, and she presented with her application the requisite certificates of competency. Her application was granted. She was examined, and upon such ex-

amination was credited with a mark of $47\frac{2}{3}$ per cent. Under the rules established by the relators, the mark required for passing is 70 per cent. She was notified of her failure and that the board would not recommend her to the governor for registration. Thereupon she appealed to the Montana State Association of Graduated Nurses, under the provisions of section 11 of the Act referred to, and that body at its first annual meeting thereafter sustained the decision of the relators. She then filed in the district court of Yellowstone county her petition praying that a writ of mandate issue commanding the relators to recommend her to the governor for registration under such Act, averring that she had pursued as a business the vocation of nursing for five years prior to March 3, 1913; that she had in fact passed said examination; and that the relators, as well as the State Association to which she had appealed, "abused the discretion vested in them," and acted in such matter unfairly and with bias and prejudice. Upon this petition and the affidavit which accompanied the same, an alternative writ was issued. The relators demurred generally, and their demurrer was overruled. They then moved to quash the alternative writ upon the grounds that the petition and affidavit were not sufficient to entitle the petitioner to the writ and that the court was without jurisdiction, and this was denied. The relators then made answer and return, the effect of which, so far as pertinent here, was to deny that the petitioner had pursued as a business the vocation of nursing for five years prior to March 3, 1913, or had passed the examination, or had been marked lower than she deserved, or had been treated unfairly or arbitrarily in said examination, and to aver that the mark of $47\frac{2}{3}$ per cent given her upon said examination, represented the best judgment of the relators thereon. The affirmative allegations of the answer were denied by a reply, and a motion of relators for judgment on the pleadings, challenging the jurisdiction of the court, was thereafter overruled. The proceedings then came on for trial, and a jury was impaneled for the purpose of answering whether the petitioner had pursued as a business the vocation of nursing for a

period of five years prior to March 3, 1913, and whether on her examination before the State Board of Examiners for Nurses she was entitled to the credit of 70 per cent or more upon her answers to the questions submitted to her. After hearing the evidence, the taking of which occupied several days, the jury answered both interrogatories affirmatively. These findings were adopted by the respondent judge, over the objection of relators and over their challenge to the jurisdiction of the court. He also made an additional finding to the effect that the relators acted from prejudice and bias in not giving the petitioner an average grade of 70 per cent or more upon her examination, and he announced as "a conclusion of law" that the petitioner "is entitled to have a peremptory writ of *mandamus* * * * directing the defendants to recommend" her to the governor of the state of Montana "for registration as a nurse under the provisions of Chapter 50 of the Session Laws of the thirteenth legislative assembly of the state of Montana." It is conceded that a judgment will be entered directing a peremptory writ to issue in accordance with said conclusion of law, unless prevented by an absolute writ of prohibition from this court as sought by the relators.

The respondents contest the right of relators to maintain this proceeding because an appeal may be taken to this court from [1] the threatened judgment whenever it shall be entered. The existence of a remedy by appeal is not of itself a bar to prohibition, unless such remedy be plain, speedy and adequate. (Rev. Codes sec. 7228.) A remedy is speedy when, having in mind the subject matter involved, it can be pursued with expedition and without essential detriment to the party aggrieved; and it is neither speedy nor adequate if its slowness is likely to produce immediate injury or mischief. (32 Cyc. 617.) The judgment proposed to be entered by the district court amounts to nothing more nor less than a peremptory mandate to the relators to do a thing which, if their contention be correct, they ought not to do, and the doing of which may cause much mischief, both public and private. The doing of it, however, would

require so little time that the district court, if correct, might well command it to be done forthwith. The taking of an appeal would not of itself operate as a stay; nor could a stay be obtained from this court until such appeal should be perfected and lodged with us, an operation which might require quite an appreciable time. Meanwhile, should the district court be exacting, the relators would be subject to proceedings in contempt, with all its annoyances and possible pains and penalties. This they could avoid only by compliance with the writ, and the effect of that would be to execute the judgment and render any appeal unavailing. We are of opinion that, under the circumstances of this case, an adequate remedy is not furnished by appeal. (*Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 10 L. R. A. 627, 24 Pac. 121; *Cronan v. District Court*, 15 Idaho, 184, 96 Pac. 768; *Terrill v. Superior Court*, 6 Cal. Unrep. 398, 60 Pac. 38; *State v. Denton*, 128 Mo. App. 304, 107 S. W. 446; *People v. Carrington*, 5 Utah, 531, 17 Pac. 735; *People v. District Court*, 26 Colo. 386, 46 L. R. A. 850, 58 Pac. 604; *Glide v. Superior Court*, 147 Cal. 21, 81 Pac. 225; *People v. Court*, 30 Colo. 123, 69 Pac. 597; *State v. Aloe*, 152 Mo. 466, 47 L. R. A. 393, 54 S. W. 494; *Keefe v. District Court*, 16 Wyo. 381, 94 Pac. 459.)

The controlling question, then, is one of jurisdiction: Whether the district court has power to issue any writ in the *mandamus* proceeding, and, if so, whether the proposed writ can be lawfully issued. The power of the district court to entertain the proceedings at all, or to enter any judgment or issue any writ, is denied upon the ground that in the case stated by the petition the relators cannot be compelled to do what the petition asks to have done, for two reasons: (a) The thing sought to be done cannot be compelled in any case; and (b) the relators cannot be compelled to do anything because the matter has passed beyond their jurisdiction by reason of the petitioner's appeal to the State Association of Nurses for whose action the relators are not responsible.

(a) We think it must be conceded that the district court has no authority to issue a peremptory writ commanding the relators to certify the petitioner to the governor for registration. The fundamental postulate of the petitioner's whole proceeding is that the relators are a public board, and this cannot be doubted in view of the provisions of Chapter 50, Laws of 1913. The board must consist of five members who are chosen by the governor with reference to their possession of some special training and skill; their principal duty is to examine persons who seek registration as professional nurses; they are required to provide a schedule of subjects upon which applicants shall be examined, which subjects must include elementary anatomy, physiology, medicine, obstetrics, gynecology, surgery, dietetics, home sanitation, and nursing; they must adopt rules for such examinations; and it is their duty to recommend to the governor for registration each duly qualified applicant who shall have successfully passed the examination. Nowhere in the statute is any standard fixed by which it may be ascertained whether an applicant has successfully passed an examination, but upon at least nine subjects, each requiring some measure of specialized knowledge and each necessarily admitting some range of opinion, a decision must somehow be made. The inference is clear that whether an applicant has successfully passed an examination is left to the fair judgment and sound discretion of the board, exercised under the rules established by it. The duty thus imposed is not merely ministerial—it is *quasi-judicial*, and its performance in any particular way cannot be compelled by judicial proceeding (*State ex rel. Gravely v. Stewart*, 48 Mont. 347, 137 Pac. 854); nor is the honest judgment of the board, no matter how erroneous, subject to judicial review. We say honest judgment, because of an apparent exception to the rule just stated that, where discretion has been abused or has been arbitrarily or capriciously exercised, *mandamus* will lie to compel the proper exercise of the powers granted; "but this exception is more apparent than real, for such an exercise of power really means, in a legal sense, no

exercise and the writ may still be said to set the officer in motion." (*Atlanta v. Wright*, 119 Ga. 207, 45 S. E. 994; *State ex rel. Mitchell F. Co. v. Toole*, 26 Mont. 22, 91 Am. St. Rep. 386, 55 L. R. A. 644, 66 Pac. 496.)

We take it to be the rule in all legal proceedings, however, that substance rather than form is the essential thing; and the [3] fact that the petitioner did pray for something which she could not get in this case would not prevent the district court from entertaining the proceeding for the purpose of granting whatever mandatory writ might be appropriate under her petition and the proof. (*State v. District Court*, 22 Mont. 220, 56 Pac. 219.) She distinctly alleges that her rejection was a capricious and arbitrary act and that judgment was not exercised by the board in her case. This is equivalent to saying that the relators have not performed the duty imposed upon them by law, and is sufficient, if true, and if no other obstacle exists, to clothe the court with jurisdiction to compel the relators to examine the petitioner, or, perhaps, to mark the papers submitted by her, in accordance with the fair judgment of relators, if they have failed in that respect.

(b) Section 11 of the Act in question provides: "Any person who makes application to the board for examination * * * who shall not pass said examination * * * may appeal to the Montana State Association of Graduated Nurses * * * and shall abide by the majority vote of said association after a full hearing thereon." That pursuant to this section the petitioner did appeal to the Montana State Association of Graduated Nurses, and that the appellate body affirmed the decision appealed from, are shown in the petition itself. It is true that she also alleges that the appellate body did not grant "a full hearing thereon," but that it likewise acted capriciously and arbitrarily. This, however, is not a matter for which the relators can be called to account, and it does not alter the fact that the appeal was taken. Indeed, the respondents seem to assume that, if the appellate body acquired any jurisdiction by virtue of such appeal, the relators' control over the matter was

at an end. They say, however, that the appellate body acquired and could acquire no jurisdiction of the appeal because the provision for it is wholly unconstitutional, in that the right of the citizen to follow any vocation or business is one of which he cannot be deprived without due process of law, had through the courts established or authorized by the Constitution; and that the legislature could not devolve upon said body any *quasi-judicial* function, because it is a mere voluntary association of persons not organized for the purpose of performing such or any governmental functions, whose membership is or may be fluctuating, and whose methods of procedure are neither prescribed nor subject to control. To these objections answer must be made: That the right of the citizen to follow any [4] lawful calling is not here involved. It is expressly provided by the Act in question that it shall not be construed "to affect or apply to the gratuitous nursing of the sick, * * * nor to any person nursing the sick for hire who does not in any way assume or pretend to have special training in the profession of nursing, and who also does not pretend to be a registered nurse." Pretension to registry is thus made essential to a violation of the statute. Now, whether there be or be not a natural right to pursue the business of nursing, there certainly is not any such right to a certificate of qualification from the state or to pretend that such certificate has been issued when it has not; and the right of the state to grant or refuse such certificate upon its own terms cannot be open to debate. Moreover, due [5] process of law is not necessarily judicial process (*Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554), and, even in those cases where the practice of a profession which is potent for harm as well as good, is positively forbidden unless the practitioner shall have established his qualification by examination before a board, there is no arbitrary deprivation of any right, for the state may require such qualifications as tend in its judgment to insure against the effect of ignorance, incapacity, deception or fraud, and may enforce such requirement by any proceedings adapted to the nature of the case.

(*Craig v. Board of Medical Examiners*, 12 Mont. 203, 29 Pac. 532; *Dent v. West Virginia*, 129 U. S. 114, 32 L. Ed. 623, 9 Sup. Ct. Rep. 231.) In the present instance, the position of the state is much stronger, for no right is denied. The aim of the Act is, not to prohibit the practice of nursing, either gratuitously or for hire, but to designate the persons for whose qualifications the state is willing to stand sponsor, and to forbid persons from claiming such sponsorship who are not entitled to it. The matter is wholly administrative, and the process of administration may be committed to any agency the legislature may choose to select, with or without direct appeal to the courts or elsewhere. Since this is so, no constitutional question can possibly arise merely because a second agency is prescribed to sit in judgment upon the first, when asked to do so by a rejected applicant. (*France v. State*, 57 Ohio St. 1, 47 N. E. 1041.)

The contention that the provision for appeal is inoperative because the appellate body is a voluntary association is also [6] without merit in law, however sound it may be as a matter of policy. In contemplation of law, the appellate body is merely an agency for carrying into effect the provisions of the Act. We know of no rule or principle, and none has been called to our attention, under which the legislature is required to designate corporations or individuals, to the exclusion of voluntary associations, as agencies for such purposes. On the contrary, it is the settled rule that no such restriction exists. (*Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *Overshiner v. State*, 156 Ind. 187, 83 Am. St. Rep. 187, 51 L. R. A. 748, 59 N. E. 468, *Ex parte Frazer*, 54 Cal. 94; *Ex parte Gerino*, 143 Cal. 412, 66 L. R. A. 249, 77 Pac. 166.) Nor is the fact that no procedure on appeal is prescribed of vital consequence: The Act requires [7] "a full hearing," and implies such orderly procedure as will enable the appellate body to fairly determine the right of appellant to be registered as based upon his examination before the primary board. (*State ex rel. Kellogg v. District Court*, 13 Mont. 370, 34 Pac. 298.)

Whether section 11 requires the applicant to exhaust his remedy by appeal to the State Association in all cases is not now in question. We may assume that it does not, but that the appeal is contemplated as from an honest or mistaken judgment, and where his rejection is arbitrary or capricious, he may by judicial mandate compel the board of examiners to fairly examine him without pursuing such appeal; but even on this assumption the rejected applicant cannot procure a writ of mandate to correct a decision from which he has appealed. The Act provides that the applicant shall abide the result of the appeal after a full hearing; and, granting that he need not abide a result which has been reached without a full hearing or without the exercise of fair judgment on the part of the appellate body, it is a necessary consequence of this provision that, where he elects to appeal, the appellant puts his cause beyond the power and control of the primary board, and the only action which can then be corrected by the courts is the action of the appellate body.

For the reasons above stated, we are of the opinion that the district court has no jurisdiction to enter the proposed or any judgment in the *mandamus* proceeding in question. A peremptory writ of prohibition is therefore directed to issue forthwith.

Writ issued.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

IN RE METTLER.

(No. 3,618.)

(Submitted February 2, 1915. Decided February 19, 1915.)

[146 Pac. 747.]

*Contempt—Jurisdiction—Procedure—Insufficient Order—Habeas Corpus.**Direct Contempt—Punishment—Procedure.*

1. While the right to punish for a direct contempt is inherent in courts, the procedure provided is purely statutory, and the law must be followed.

[As to courts and their tribunals authorized to punish for contempt, see note in 117 Am. St. Rep. 950.]

Same—Habeas Corpus—Pleadings—Presumptions.

2. Though one under punishment for a direct contempt cannot, on *habeas corpus*, deny the facts stated in the order adjudging him guilty, no presumptions or intendments are to be indulged against him.

[As to obtaining release on *habeas corpus* from judgments punishing for contempt, see notes in 22 Am. St. Rep. 422; 87 Am. St. Rep. 179.]

Same—Insufficiency of Order.

3. *Held*, that an order of the district court adjudging an attorney guilty of contempt committed in its immediate presence, which recited that the contemner "by his conduct, words and manner disturbed the orderly proceedings of this court, and by his insolent demeanor, angry words, is in contempt" etc., consisted of mere conclusions and was fatally defective because not in compliance with the provision of section 7311, Revised Codes, that such an order must recite the facts as occurring at the time of the alleged contempt.

Same—Nature of Proceedings—Order must be Certified.

4. Proceedings in contempt are in their nature criminal; hence the order adjudging one guilty and committing him to the custody of the sheriff until the fine imposed shall be paid must, under section 9377, Revised Codes, be certified; in the absence of such certification, such order was not any warrant for the detention of the complainant.

[As to prosecutions for contempt as criminal proceedings within rule as to jeopardy, see note in Ann. Cas. 1912B, 1008.]

Application of Frank W. Mettler, Esq., for a writ of *habeas corpus*. Complainant ordered discharged.

Mr. Albert J. Galen, for Complainant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Frank W. Mettler, an attorney duly admitted to practice in the courts of this state, having been adjudged to be in contempt of the district court of Lewis and Clark county, applied for his

release from imprisonment upon *habeas corpus* proceedings. The sheriff has made return to the writ that he detained the petitioner by virtue of a certain order of the district court, which is attached to and made a part of the return and is as follows:

“[Title of Court.]

“In the Matter of the Contempt of F. W. Mettler.

“The court having under consideration the disobedience of a subpoena by a witness who was duly subpoenaed in this court, and having placed the witness upon the stand and interrogated him as to the reason why he did not appear, F. W. Mettler, an attorney and practicing lawyer at this bar, interrupted the proceedings by making demands that he be heard after the court had told him that there was nothing to be heard, and he refused to sit down, and by his conduct, words and manner disturbed the orderly proceedings of this court, and by his insolent demeanor, angry words, is in contempt of this court, and is adjudged in such contempt, he will pay a fine of \$300, and stand committed to the county jail until this fine is paid.”

A demurrer has been interposed, and the only questions which call for solution are such as appear from the face of the return and test the jurisdiction of the court which entered the order; and the further inquiry whether this petitioner was held by legal process. In *State v. District Court*, 35 Mont. 321, 89 Pac. 63, this court, having under consideration a proceeding of similar character, said: “While there is some conflict between the early and later decisions as to the scope of the meaning of the term ‘jurisdiction’ as applied to a case of this character, the decided weight of authority now supports the view that, in order for the judgment to be proof against an attack made by *habeas corpus* proceedings, the court rendering it must have had jurisdiction of the person and of the subject matter, and, in addition thereto, must have possessed the power or authority to render the particular judgment which it did pronounce; and the absence of any one of these factors renders the judgment void, and

consequently open to collateral attack." That the district court had jurisdiction of the subject matter is determined by the Constitution. (Sec. 11, Art. VIII, Const.; *State v. District Court*, 35 Mont. 51, 88 Pac. 564.) The order above discloses on its face that the court had jurisdiction of the person.

A contempt committed in the immediate presence of the court is designated "direct," as distinguished from a "constructive" contempt, which is not committed in the court's presence. A contempt directed against the dignity or authority of the court is "criminal," as distinguished from a "civil" contempt, which arises out of a failure to obey an order made in a civil action for the benefit of the opposing party. A direct contempt may be punished summarily (Rev. Codes, sec. 7311), but a constructive contempt can be punished only after a hearing upon an affidavit showing the facts constituting the contempt (sec. 7311) and the answer thereto by the party accused (sec. 7317).

It appears from the order under consideration that it was the purpose of the lower court to punish this petitioner for a criminal contempt committed in the immediate presence of the court, and by this process of elimination our inquiry is narrowed to an investigation of two questions: Had the district court authority to make this particular order? And was the paper authority in the hands of the sheriff effective for the purpose intended?

Section 7309, Revised Codes, enumerates the acts and omissions which constitute contempt of court. Among them are:

"1. Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

"2. A breach of the peace, boisterous conduct or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding. * * *

"9. Any other unlawful interference with the process or proceedings of a court."

From the tenor of the order in question, it appears that this petitioner was charged with misconduct under one or more of these subsections. But in the wisdom of the legislature it was

deemed incompatible with our ideas of the due administration of justice that the decision of the presiding judge should be final, and provision was made accordingly for a review by this court. [1, 2] (Sec. 7322.) While the right to punish for a direct contempt is inherent in the court, the procedure is purely statutory, and compliance with the law must be had. Having invoked the remedy by *habeas corpus* proceeding, the law does not permit the petitioner to deny the facts stated in the order adjudging him to be in contempt. Such facts as are stated are to be taken as true, but no presumptions or intendments are to be indulged against the accused. (*Batchelder v. Moore*, 42 Cal. 412.) To the end that the order adjudging one to be in contempt may be [3] reviewed, section 7311 provides: "When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence." Unless the order recites the facts which constitute the alleged contempt, no review is possible; and if an order omitting such facts be permitted to stand, the very purpose of the statute would be defeated.

The only facts recited in the order above are that the accused attorney (a) demanded to be heard, and (b) refused to sit down. The recitals that Mettler "by his conduct, words and manner disturbed the orderly proceedings of this court, and by his insolent demeanor, angry words, is in contempt of this court," do not contain any facts, but merely conclusions. What the attorney's words were, what his manner was, what it was that constituted his insolent demeanor—none of these matters is disclosed by the order. Whether an order in this form is sufficient to justify any punishment is not a new question in this state or elsewhere, and the subject has become stale through oft-repeated declarations of courts and text-writers. In *State ex rel. Breen v. District Court*, 34 Mont. 107, 85 Pac. 871, this court had under consideration an order very similar to the one now before us, and concerning it said: "The conviction here was for a direct contempt. The judgment, however, is wholly insufficient to meet

the requirements of the statute. It does not contain, even by appropriate reference to the proceedings before the court, anything to show what the matters referred to as scandalous were, nor any fact tending to show what the manner of the relator was. It states conclusions and inferences only, drawn by the judge from the facts as they actually transpired, thus leaving this court no alternative but to accept these conclusions or to hold the order invalid. The purpose of the statute is to require the court to set forth the jurisdictional facts, so that the propriety of the judgment of conviction may be examined and reviewed. If adjudged sufficient as it stands, the order complained of would be conclusive upon this court, and review of it, as to the sufficiency of the facts to put the power of the court in motion, would be impossible. In a given case, where the contempt consists in the manner or bearing of the contemner, it may be difficult for the court to set forth the facts in any other form than by a shorthand rendering thereof, so to speak; but it is, nevertheless, necessary that the attendant circumstances be set forth, so that the propriety of the conclusion reached may be determined."

If the contempt be one not committed in the immediate presence of the court, section 7311 above requires that an affidavit be filed which shall set forth specifically the facts constituting the contempt. If the contempt be committed in the presence of the court, the same statute declares that the order itself must set forth the facts, and this means that they must be set forth with the same particularity, as in case of constructive contempt they are required to be shown by affidavit. (*Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372.) An attorney is an officer of the court, and, within the scope of his duties, his right to be heard in behalf of his client is guaranteed by the Constitution. It is for an abuse of his office only that he may be called to account in contempt proceedings. The bare fact that this petitioner made demands to be heard does not constitute contempt. If he was a mere interloper and stranger to the hearing then being conducted in court, that fact would have appeared in the

order; in its absence, and in view of the fact that a hearing was being had, and that petitioner is an attorney duly admitted to practice in all of the courts of this state, it is but a fair inference that he was acting or attempting to act as counsel for the witness who was then being examined relative to his failure to appear in response to a subpoena served upon him. (*Ex parte Shortridge*, 5 Cal. App. 371, 90 Pac. 478.)

Assuming that petitioner was counsel for the witness who was being examined, he had the right to be heard, in his client's behalf; but he did not have the right to abuse his privilege to insult the court or judge, or interrupt the orderly procedure which should characterize every judicial investigation. Arbitrary rulings or oppressive conduct on the part of the court will not warrant retaliation by an attorney by resort to undignified or insolent behavior. The law affords him ample redress. Because of the insufficient recitals in the order, we are not given an opportunity to review petitioner's demeanor. If it was in fact contemptuous, he merited punishment; and if the contemptuous character was made to appear, the order would meet with our approval. But mere conclusions of the court afford us no means of determining whether the circumstances justified the order. Since our investigation is limited to a review of the order; and it fails to state the facts required by section 7311 above, no alternative is left but to declare it insufficient.

In the foregoing discussion we have assumed that the alleged misconduct of petitioner occurred in open court or during a hearing before the judge at chambers; but it is only by the barest inference that it can be said that the controversy arose at the courthouse, at the judge's chambers, or in open court. The order fails to state that court was in session, if such was the fact, or that a hearing was being conducted at chambers, if that was the fact. The statute, which requires the order adjudging one in contempt to set forth the facts constituting the contempt, has a definite purpose in view, and to follow its mandate does not impose any hardship upon the court or judge.

Proceedings in contempt are in their nature criminal (*State ex rel. B. & M. etc. Co. v. Judges*, 30 Mont. 193, 76 Pac. 10), [4] and the order adjudging one in contempt is in its nature a final judgment (*New Orleans v. Steamship Co.*, 20 Wall. 387, 22 L. Ed. 354). But the sheriff cannot execute a judgment in a criminal matter or proceeding without competent authority. (Rev. Codes, sec. 9773.) Section 9377 provides: "When a judgment, other than of death, has been pronounced, a certified copy of the entry thereof upon the minutes must be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require its execution." The order returned by the sheriff as the only authority upon which the petitioner was confined in jail is not certified, and does not meet the requirements of the law.

Other objections to the order are urged upon us, but we deem it not necessary to consider them. In failing to state facts which constitute the alleged contempt, the order in question is fatally defective as a judgment in contempt, and the copy of the order in the hands of the sheriff was not sufficient authority to justify the detention of the petitioner. The demurrer to the return is sustained, and the petitioner is ordered discharged.

By direction of this court, petitioner was admitted to bail pending the final determination of this proceeding. The bond furnished in response to that order is discharged, and the sureties thereon exonerated.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

DAY, APPELLANT, v. KELLY, RESPONDENT.

(No. 3,468.)

(Submitted February 8, 1915. Decided February 23, 1915.)

[146 Pac. 930.]

Personal Injuries—Highways—Automobiles—Contributory Negligence—Admissions—Inconsistent Defenses—Pleading and Practice—Nonsuit.

Personal Injuries—Negligence—Failure of Proof—Nonsuit.

1. In an action for damages for personal injuries sustained in a run-away alleged to have been caused by defendant's negligence in driving an automobile toward plaintiff after discovering that his horse had become frightened, in failing to turn out of the road, and in causing or permitting the machine to make very loud and unusual noises, a nonsuit was properly granted where plaintiff's own evidence showed that the horse was well broken and accustomed to automobiles, and where no evidence was offered that the noises from the automobile were caused by any act of defendant or that, by the exercise of the highest possible degree of care, they could have been prevented.

[As to rule that mere scintilla of evidence is sufficient to justify submission of cause to jury, see note in Ann. Cas. 1914B, 472.]

Same—Pleading—Contributory Negligence—Admissions.

2. Where, in a personal injury action, the answer contains a general or specific denial of the allegations of negligence stated in the complaint, the affirmative plea that plaintiff was guilty of contributory negligence does not confess the truth of the acts of negligence set forth in the complaint, on the theory that contributory negligence presupposes negligence on the part of defendant.

Same—Pleading—Inconsistent Defenses.

3. A defendant may plead inconsistent defenses, so long as the inconsistency is not so marked that, if the facts stated in one be true, those stated in the other must of necessity be false.

[As to rule that alternative allegations in pleadings neutralize each other, see note in Ann. Cas. 1914A, 1239.]

Appeal from District Court, Deer Lodge County; Geo. B. Winston, Judge.

ACTION by Artemus Day against Bertha Kelly. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Mr. Thos. P. Stewart and Messrs. Maury, Templeman & Davies, for Appellant, submitted a brief; Mr. John F. Davies argued the cause orally.

Appellant contends that under the issues as framed by the pleadings, the defendant admitted that she was negligent in the

form and manner set out in plaintiff's complaint. The first affirmative defense set out by the defendant in her answer is a plea of contributory negligence. In Montana the plea of contributory negligence is a plea in confession and avoidance. It has been so held on several occasions and it has been generally so accepted. (*Birsch v. Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940; *Nilson v. City of Kalispell*, 47 Mont. 416, 132 Pac. 1133.) If actionable negligence, therefore, is admitted by the defendant, it was not necessary for the plaintiff to introduce any evidence upon that issue, and the court was in error in granting an nonsuit in this case. That the first affirmative defense set out in defendant's answer is a plea of contributory negligence and filed and intended by the defendant as such, can scarcely be doubted; and under the decisions of this court it certainly is a plea of contributory negligence. (*Molt v. Northern Pac. Ry. Co.*, 44 Mont. 471, 120 Pac. 809; *Gleason v. Missouri River Power Co.*, 42 Mont. 238, 112 Pac. 394.)

The law governing this case is found in sections 1420, 1427 and 1430, Revised Codes. We contend that a court cannot say as a matter of law that the defendant was not negligent in driving her machine some seventy-five or eighty feet directly toward the plaintiff after seeing that the horses which the plaintiff was driving were frightened by her machine, under the law as laid down in sections 1427 and 1430, *supra*. The defendant in keeping in the center of the road and in failing to turn to the right was negligent as a matter of law (sec. 1430), and a court cannot, as a matter of law, say that this negligence was not a proximate cause of plaintiff's injuries. When the defendant stopped her machine she caused it to give very loud and unusual noises, and a court cannot say as a matter of law that this act on the part of the defendant was not a negligent act. (See Babbitt on the Law Applied to Motor Vehicles, secs. 287 and 906, and cases therein cited; *House v. Cramer*, 134 Iowa, 377, 13 Ann. Cas. 461, 10 L. R. A. (n. s.) 655, 112 N. W. 3; *Tudor v. Bowen*, 152 N. C. 441, 136 Am. St. Rep. 836, 21 Ann. Cas. 646, 67 S. E. 1015.)

Messrs. Rodgers & Rodgers, for Respondent, submitted a brief; *Mr. W. B. Rodgers* argued the cause orally.

The evidence in this case does not disclose that the defendant did anything which a reasonable person ought to have anticipated would cause injury to plaintiff or to anyone else. On the contrary, it discloses that she was doing everything possible to prevent any occurrence of the kind. All that the defendant did was to stop her machine. This she did for the benefit of the plaintiff. There is no evidence to show that she stopped it negligently. Neither is there any evidence to show that a reasonable person would have anticipated that an explosion would be caused by the stopping of the machine, or that if it were caused it would injure in the least the plaintiff, riding a well-broken, gentle, tractable horse, accustomed to automobiles. Without evidence of this character to support this conclusion, it cannot be said that anything the defendant did, or caused to be done, was the proximate cause of any injury to the plaintiff. (1 Thompson's Commentaries on the Law of Negligence, secs. 28, 50; *Rysdorf v. George Pankratz Lumber Co.*, 95 Wis. 622, 70 N. W. 677; *Morey v. Lake Superior Terminal etc. Co.*, 125 Wis. 148, 12 L. R. A. (n. s.) 221, 103 N. W. 271.) Plaintiff and the defendant were in the exercise of an equal right upon the public highway; both had a right to travel thereon, and their standard of duty was reasonable care toward each other. Their rights and duties were reciprocal and correlative. The evidence discloses that the defendant not only used reasonable care, but used the highest degree of care attainable to prevent injury, inconvenience or annoyance to the plaintiff. (*Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 875; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522; *Sapp v. Hunter*, 134 Mo. App. 685, 115 S. W. 463.)

Contributory negligence may properly be pleaded hypothetically, as pleaded in this case, and such a plea does not admit the negligence charged in plaintiff's complaint as a fact, and relieve the plaintiff of the necessity of proving the same upon the trial, where both the general issue and the plea of contributory negligence are pleaded, as in this case. (See *Leavenworth Light*

& Heating Co. v. Waller, 65 Kan. 514, 70 Pac. 365; *Urquhart v. Powell*, 54 Ga. 29; *McKasy v. Huber*, 65 Minn. 9, 67 N. W. 650; *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613; *McDonald v. American Mortgage Co.*, 17 Or. 626, 21 Pac. 883; *Veasey v. Humphreys*, 27 Or. 515, 41 Pac. 8; *Nunnemacker v. Johnson*, 38 Minn. 390, 38 N. W. 351; *Ketcham v. Zerega*, 1 E. D. Smith (N. Y.), 560; *Willard v. Giles*, 24 Wis. 319, 323; *Leary v. Anaconda Copper Min. Co.*, 36 Mont. 157, 92 Pac. 477.)

A plea of contributory negligence, directly pleaded, joined with a general denial, if it admits at all, admits or presupposes negligence on the part of the defendant as an implication of law. This implication is for the purposes of the plea only, and not for any other purpose. It does not admit the negligent acts charged against defendant in plaintiff's complaint; it never admits negligence as a fact; it does not in any way destroy the effect of a denial by the defendant of the negligent acts alleged in the complaint, nor relieve the plaintiff from the necessity of making out his case by proving the acts of negligence as charged.

Under Code provisions like ours there is no conflict in the decisions upon this point. Nor is there any just ground for asserting that a different rule existed at the common law. (*Clemens v. St. Louis & S. F. R. Co.*, 35 Okl. 667, 131 Pac. 169; *Jackson v. Natchez*, 114 La. 931, 108 Am. St. Rep. 366, 70 L. R. A. 294, 38 South. 701; *Bomar v. Louisiana etc. R. Co.*, 42 La. Ann. 1206, 9 South. 244; *Grace v. Newbre*, 31 Wis. 19, 24; *Pavey v. Pavey*, 30 Ohio St. 600; *Ramm v. Galveston H. & S. A. Ry. Co.* (Tex. Civ. App.), 92 S. W. 426; *Louisville & N. R. Co. v. Pearce*, 142 Ala. 680, 39 South. 72; *Kline v. Hanke*, 14 Mont. 361, 36 Pac. 454; *Irwin v. Holbrook*, 32 Wash. 349, 73 Pac. 360; *Davis v. Seattle Nat. Bank*, 19 Wash. 65, 52 Pac. 526; *Bell v. Brown*, 22 Cal. 671; *Treadway v. Sioux City etc. Ry. Co.*, 40 Iowa, 526.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On April 30, 1911, plaintiff was riding on horseback driving loose horses along the public road, when he met an automobile

driven by defendant. His riding horse became frightened, reared and fell, crushing one of plaintiff's feet and otherwise injuring him. He brought this action to recover damages, and in his complaint charged the defendant with negligence (a) in driving the automobile toward him after she discovered that his horses had become frightened; (b) in failing to turn out of the road; and (c) in causing or permitting the machine to make very loud and unusual noises. Issues were joined, and the cause was brought to trial. At the close of plaintiff's testimony the court sustained a motion for nonsuit, and judgment was entered in favor of defendant. From that judgment, plaintiff appealed.

1. Of the three grounds of negligence charged, the first and second were entirely eliminated upon the trial by the testimony [1] of plaintiff himself, to the effect that his riding horse was well broken, accustomed to automobiles, that he could safely ride him within five feet of one, and that it was the loud and unusual sound emitted from the machine which caused his riding horse to plunge and fall, with the resulting injury to plaintiff. No evidence was offered tending to show that the noise from the machine was caused by any act of defendant, or that by the exercise of the highest possible degree of care she could have prevented it. Under these circumstances the trial court correctly held that plaintiff had failed to make out a *prima facie* case.

2. Counsel for appellant contend that the affirmative defense of contributory negligence pleaded in the answer confessed the [2] negligence alleged in the complaint, and released the plaintiff from the burden of proving actionable negligence on the part of defendant. But for the earnest insistence of counsel that support for their view is to be found in the decisions of this court, the contention would scarcely merit serious consideration. In *Wastl v. Montana Union Ry Co.*, 24 Mont. 159, 61 Pac. 9, this court quoted approvingly the definition of contributory negligence from Beach on Contributory Negligence, section 7, and from the analysis of a like definition by Thompson, from Thompson on Negligence, section 3, page 1148, and then said: "The

principle embodied in these definitions is that, in order that there may be any contributory negligence on plaintiff's part, there must be negligence also on the part of the defendant having a direct and proximate causal relation to the injury." In *Birsch v. Citizens' El. Co.*, 36 Mont. 574, 93 Pac. 940, we said: "Contributory negligence on the part of plaintiff presupposes negligence on the part of the defendant." Again, in *Nilson v. City of Kalispell*, 47 Mont. 416, 132 Pac. 1133, we said: "The very charge now made by the city that the plaintiff was guilty of contributory negligence presupposes actionable negligence on the city's part." And it is by these statements of an axiom of law that this court is now sought to be committed to the doctrine that a plea of contributory negligence confesses the truth of particular allegations of negligence stated in the complaint, notwithstanding the answer also contains a general or specific denial of those allegations. We have employed the phrase "axiom of law" advisedly. The declaration, "contributory negligence on the part of plaintiff presupposes negligence on the part of defendant," does not require the citation of authority to support it or admit of proof of its correctness. It is a self-evident truth, but one which does not bear the remotest relationship to the question now for the first time pressed upon the attention of this court. Whether phrased in the elegant diction of the answer now before us, or not, the plea of contributory negligence, when coupled with a denial, is always hypothetical in effect, if not in form, and amounts to no more than this: I deny absolutely that I am guilty of negligence; but assuming, without admitting it, that some act of mine was negligent in character and proximately contributed to plaintiff's injury, nevertheless plaintiff's negligent acts united with my act to produce the injury, and without which the injury would not have occurred. To hold that such a plea admits the truth of the allegations of specific acts of negligence in the complaint would revolutionize the rules of pleading in vogue in states employing the Code system, as here. If it be assumed, for the purposes of this argument, that the defenses of general denial and contributory negligence are verbally incon-

sistent, they are not so inconsistent as to fall under the ban of the rule implied from the fact that our pleadings are required [3] to be verified. A defendant may plead inconsistent defenses, so long as the inconsistency is not so marked that, if the facts stated in one be true, the facts stated in the other must of necessity be false. (*Johnson v. Butte & Superior C. Co.*, 41 Mont. 158, 48 L. R. A. (n. s.) 938, 108 Pac. 1057; *O'Donnell v. City of Butte*, 44 Mont. 97, 119 Pac. 281.) This is the meaning of section 6549, Revised Codes, which provides: "A defendant may set forth, in his answer, as many defenses or counterclaims, or both, as he has, whether they are such as were formerly denominated legal or equitable" (*Kline v. Hanke*, 14 Mont. 361, 36 Pac. 454; *Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871), and is the uniform rule of Code pleading. (Phillips on Code Pleading, secs. 262-266; Bliss on Code Pleading, secs. 340-344; 1 Sutherland, Code Pleading and Practice, sec. 466; Boone on Code Pleading, sec. 78.)

Counsel for appellant have not referred to any authority sustaining their position, while the courts and text-writers are practically unanimous in holding against them. In 29 Cyc. 582 the rule is stated as follows: "A general denial and plea of contributory negligence do not constitute inconsistent defenses and they may be pleaded together, and negligence on the part of defendant is not admitted by a plea of contributory negligence following a general denial."

"While a denial of negligence and an allegation of contributory negligence are verbally inconsistent, they are not so in practice, and a defendant need not elect between the two defenses; nor does the plea of contributory negligence, when properly pleaded, admit the negligence as charged in the petition." (6 Current Law, 768.)

In 1 Thompson on the Law of Negligence, section 390, it is said: "In Louisiana it is held that a plea of contributory negligence admits an issue of negligence on the defendant's part. But if this means that a plea of contributory negligence is in the nature of a plea of confession and avoidance, admitting the

negligence of the defendant, and avoiding it by showing that the plaintiff was also negligent, then it is unsound and incorrect, unless in a special application to rules of pleading peculiar to particular states. The pleading of contributory negligence as a special defense is not inconsistent with a denial of the negligence of the defendant. The rule of the modern Codes which forbids the pleading of inconsistent defenses is therefore not violated by the defendant denying his own negligence and setting up the negligence of the plaintiff. Hence the defendant cannot be required to elect between two separate paragraphs of his answer, one of which denies any negligence on his part, while the other sets up contributory negligence on the part of the plaintiff. A defendant may, therefore, both traverse the complaint and plead contributory negligence." In his criticism of the Louisiana court, Judge Thompson cites *Bomar v. Louisville N. R. Co.*, 42 La. Ann. 983, 8 South. 478. That the learned author, as well as others, misconstrued the meaning of the language employed by the court, is evidenced by the opinion on application for rehearing, in which the court said: "We discuss this application only for the purpose of correcting a very grave misconception of our opinion into which counsel has fallen. We have not held, and we are far from holding, that the plea of contributory negligence by a defendant sued for negligence operates an admission of the negligence charged; nor does the language of our opinion admit of any such construction. We said: 'In alleging contributory negligence, defendant admits that there is an issue of negligence between it and the plaintiff, not between plaintiff and a third party.' The admission that there is an issue of negligence is very different from, and indeed contradictory of, an admission of the negligence itself, which latter admission would eliminate and destroy the issue of negligence." (*Bomar v. Louisville N. R. Co.*, 42 La. Ann. 1206, 9 South. 244.)

The decided cases likewise are agreed upon the rule as stated in the foregoing texts: *Leavenworth L. & H. Co. v. Waller*, 65 Kan. 514, 70 Pac. 365; *Louisville N. R. Co. v. Hall*, 87 Ala. 708, 13 Am. St. Rep. 84, 4 L. R. A. 710, 6 South. 277; *Clemens v.*

St. Louis & S. F. R. Co., 35 Okl. 667, 131 Pac. 169; *Jackson v. Natchez*, 114 La. 981, 108 Am. St. Rep. 366, 70 L. R. A. 294, 38 South. 701; *McDonald v. Montgomery St. Ry. Co.*, 110 Ala. 161, 20 South. 317; *Pugh v. Oregon Imp. Co.*, 14 Wash. 331, 44 Pac. 547, 689; *Kimble v. Stackpole*, 60 Wash. 35, 35 L. R. A. (n. s.) 148, 110 Pac. 677; *Weingartner v. Louisville N. R. R. Co.*, 19 Ky. Law Rep. 1023 (42 S. W. 839).

In contemplation of law, a demurrer admits every allegation of the complaint well pleaded; but after answer, containing a general denial, no one would have the hardihood to offer the demurrer as evidence that defendant had admitted the facts stated in the complaint to be true. The demurrer admits the allegations of the complaint only for the purposes of the demurrer, and the plea of contributory negligence by implication of law admits negligence on the part of the defendant, but only for the purposes of the plea. It does not admit the truth of the allegations of particular acts constituting negligence, or relieve the plaintiff from the burden of proof upon the issue of negligence.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

PANCHOT, APPELLANT, v. LEET, COUNTY TREASURER,
RESPONDENT.

(No. 3,602.)

(Submitted February 8, 1915. Decided February 23, 1915.)

[146 Pac. 927.]

Counties—Taxation—High Schools—Public Expenditures—Constitutional Limit—Approval by Electors—Implied Approval—Special Funds—Indebtedness.

Taxation—When Power not Existent.

1. A public agency may not, by taxation or otherwise, raise funds which it has no authority to expend.

[As to the purposes for which the power of taxation may be asserted, see note in 8 Am. St. Rep. 506.]

Counties—Taxation—High School Purposes—Limit of Expenditure Without Approval of Electors.

2. *Held*, that a levy for the purpose of erecting a county high school building which would raise in excess of \$40,000 was void where the approval of the expenditure by the electors had not first been secured, as required by the provision of section 5, Article XIII, Constitution of Montana, that no county indebtedness or liability for any single purpose in excess of \$10,000 shall be incurred without the approval of a majority of the electors voting at the election called for that purpose.

[As to equity jurisdiction of election contests relating to taxation, see note in Ann. Cas. 1912C, 691.]

Same—High Schools—Erection of Building—Compulsory Duty of Trustees.

3. *Quære*: Upon the creation of a county high school under Chapter 76, Laws of 1913, is it the absolute duty of the board of trustees to forthwith erect a high school building?

Same—Compulsory Expenditures—Constitutional Limit.

4. If Chapter 76, Laws of 1913, makes it compulsory upon the board of high school trustees to forthwith erect a high school building after a favorable vote on the question of the establishment of such a school, the cost of which building exceeds the sum of \$10,000, it is invalid in this respect, since the legislature is without power to compel the expenditure of an amount of county funds in excess of such amount (Art. XIII, sec. 5, Const.) without the previous approval of the electors.

Same—Expenditures Beyond Constitutional Limit—Implied Approval by Electors.

5. By voting for the establishment of a county high school, the electors did not impliedly authorize the expenditure of an unknown sum in excess of the constitutional limit of \$10,000, *supra*, for the erection of a building, to be raised by a levy sought to be enjoined.

Same—Public Expenditures—Special Funds—Indebtedness.

6. *Held*, that by placing the funds sought to be raised by the levy referred to above, in a special fund to be used for building purposes only, the constitutional objection would not be obviated, since by the contemplated expenditure thereof, in the construction of a high school building, a contract liability for a single purpose in excess of \$10,000 would necessarily be incurred without the approval of the electors.

Appeal from District Court, Chouteau County; Jno. W. Tattan, Judge.

APPLICATION by John D. Panchot against W. R. Leet, as treasurer of Chouteau county, for injunction to restrain the collection of a tax. From an order denying a temporary injunction, plaintiff appeals. Reversed and remanded.

Messrs. Galen & Mettler, for Appellant, submitted a brief; *Mr. Albert J. Galen* argued the cause orally.

Messrs. Stranahan & Stranahan, for Respondent, submitted a brief; *Mr. James A. Walsh*, of Counsel, *Mr. F. E. Stranahan* and *Mr. Walsh* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The appellant, a citizen of Chouteau county and a taxpaying owner of real and personal property therein, avers: That at the regular school election of 1914 there was submitted to the qualified electors of Chouteau county the question whether bonds of said county should be issued to the amount of \$50,000 for the purpose of procuring a site and erecting a building for the county high school theretofore established; that a decisive vote was cast against said proposition; that, notwithstanding this expression of the popular will, and in order to thwart the same, the board of county high school trustees, on August 8, 1914, made and transmitted to the board of county commissioners a certified estimate of the rate of tax required to raise the amount desired for the purchase of a site and the construction of a county high school building, and fixed the levy for such purpose at five mills, which levy was accordingly made by the board of county commissioners; that the entire assessed valuation of Chouteau county for the year 1914 is the sum of \$8,194,492, and said levy of five mills will raise in excess of \$40,000, which sum it is proposed to devote to the purpose mentioned, although no consent to the expenditure of any moneys for such purpose has been procured from the electors of said county; that the respondent, as county treasurer of Chouteau county, threatens to enforce collection of said tax so levied. Upon these and certain minor facts set forth in his complaint, the appellant sought a temporary injunction from the district court to restrain the collection of the tax. This was denied, and from the order of denial this appeal is taken. It is conceded on both sides that but one question is presented; viz., whether, upon the facts stated, the tax in question is void.

It is indisputable that the board of county commissioners has no power to make, of its own motion, a levy of taxes for county high school purposes. The establishment of county high schools, the maintenance of them, and the erection of buildings therefor, are governed wholly by the provisions of Chapter 76, Laws of 1913, from which it is perfectly clear that the initiative in the

matter of raising funds lies wholly with the board of high school trustees. The latter, however, are authorized to estimate "the amount of funds needed for building purposes" and "the rate of tax required to raise" such amount; and, when this has been properly done and certified to the county commissioners, a levy must be made. The validity of the levy in question is therefore to be determined by the power vested in the board of high school trustees.

The contention of the appellant is that the levy in question is [1] void because the funds sought to be raised thereby cannot be lawfully expended by the board of trustees. This contention must be sustained if the premise be correct; for, though the trustees may cause a levy of taxes to raise funds "needed for building purposes," and though it be colloquially correct to say that funds required for the erection of a public structure are needed for building purposes, yet it would be absurd to hold that money can be needed, in any legal sense, for a given public purpose, if it cannot, under the circumstances, be expended for such purpose. Indeed, we take it to be axiomatic that a public agency may not, by taxation or otherwise, raise funds which it has no authority to expend. (*Carlson v. City of Helena*, 39 Mont. 82, 106, 17 Ann. Cas. 1233, 102 Pac. 39.)

The question, then, is whether the board of trustees can expend the moneys sought to be raised by the levy in question. [2] Section 5, Article XIII, of the Constitution provides that: "No county shall incur any indebtedness or liability for any single purpose to an amount exceeding \$10,000 without the approval of a majority of the electors thereof, voting at an election to be provided by law." In *Hefferlin v. Chambers*, 16 Mont. 349, 40 Pac. 787, it was expressly held that by this provision: "The Constitution intended to limit the powers of the commissioners, as to an expenditure for a single purpose, to a certain figure, unless they obtained the approval of the people for such expenditure." The fact that the expenditure here involved is not to be set aside by the commissioners in nowise alters the situation, because the limitation is addressed to the county. By the

terms of Chapter 76, Laws of 1913, a county high school can be created only by the county; its trustees are a county agency; property acquired for its purposes is county property; and any obligation incurred in its behalf is a county obligation. The object of the levy in question, therefore, is to raise funds for a county purpose, which can be carried out only by contract. In other words, a liability is to be incurred which, in the end, is to involve an expenditure in excess of \$40,000. To say that such a transaction does not require the previous authorization of the people is to ignore the plain language of the constitutional provision above recited.

The respondent suggests, however, that as the erection of a [3, 4] high school building is made compulsory on the board of trustees by the general school law, there is a grave question whether the constitutional inhibition applies to an expenditure for such a purpose, and they argue that, when the electors of Chouteau county voted to establish the school, "they voted their approval of the levy of a tax, or, if you please, of an indebtedness or liability for building purposes in any amount not exceeding ten mills on the dollar annually of the assessed value of the county," which the board might see fit to require. We shall not pause to consider, further than to doubt, whether, the legislature ever intended that, upon the creation of a county high school, it should be the absolute duty of the board to forthwith, and under all circumstances whatever, erect a high school building. There are sections of the Act which indicate an alternative, and no such intention is to be imputed to the legislature if its execution would otherwise involve an infringement of the Constitution. The distinction between voluntary and compulsory indebtedness has been commonly invoked in cases where an excess of the constitutional limit is claimed, and it is the settled rule that liabilities arising from tort, being compulsory, are not to be considered in computing the public indebtedness in such cases. The same principle has likewise been applied in Washington and elsewhere to obligations and expenditures commanded by the Constitution itself. (*Rauch v. Chapman*, 16 Wash. 563;

58 Am. St. Rep. 52, 36 L. R. A. 407, 48 Pac. 253.) Neither consideration, however, compels the view that a thing forbidden by the Constitution can be made compulsory by mere legislation, or that the legislature can absolve any public agency from the restrictions of the Constitution. On the contrary, the Constitution is to be read into every statute by which a duty is imposed upon public agencies, and, if the duty is to do a thing which cannot be done without first obtaining the consent of the electors, then manifestly it becomes a part of that duty to get such consent.

The argument that when the voters of Chouteau county sanctioned the establishment of the county high school they thereby authorized the expediture of more than \$40,000 for building purposes, to be raised by the levy in question, is plausible, but specious. It is founded upon the assumption that the immediate erection of a building to cost more than \$10,000 is necessarily implied from the establishment of the school. There is no such implication. The establishment of a county high school does, indeed, require that the trustees make suitable provision for carrying it on, to which end they may contract "for the use of suitable buildings * * * for such time as may be deemed best for the interests of the county"; and it does assume that they will, "as soon as practicable," proceed to select and acquire a site, purchase materials, and let such contracts for necessary school buildings as they may deem proper. "They shall not, however, make any purchase or enter into any contract whereby obligations are assumed in excess of the amount of funds on hand or available through the levy of taxes for the current year or the issuance of bonds." Must the elector who votes to establish a county high school take note of these provisions and infer from them that the board will forthwith incur a liability or expend an unknown sum in excess of \$10,000 for the erection of a costly building, without further consulting him? He knows that an issue of bonds to raise funds for such purpose cannot be uttered without his express assent. Must he assume that taxes for such purpose will nevertheless be laid? Or may he be supposed to infer that, since the powers of the board are limited by

the Constitution, no expenditure in excess of \$10,000 without his consent could "be deemed for the best interests of the county," that "as soon as practicable" means after he has consented, and that, until he consents, no such sum will be regarded as "available" through taxation? We are cited to a number of decisions, including several from this court, to support the proposition that "every power necessary to execute the power expressly granted is necessarily implied." That has always been the law in this state; but it has no relevancy here, because, in our view, the power to expend a sum in excess of \$10,000 for building purposes without the express authorization of the electors is no more necessary to carry into effect the establishment of a county high school than the erection of a courthouse, under similar circumstances, is necessary to effectuate the establishment of a county.

Respondent's last contention on the merits is that by getting the money in hand, through the levy in question, a special fund [6] is created which can be used for no other purpose than the construction of a high school building, and that an obligation payable solely out of a special fund in hand is not a liability within the meaning of the constitutional provisions fixing the limit of county indebtedness. As applied to the case at bar, this contention not only assumes that a special fund can be created when there is no authority to expend it, but it ignores the distinction between the provision against expenditures exceeding a certain sum for a single purpose and the restriction upon the amount of indebtedness. Whether the obligations to be created by the construction of the high school would or would not be an indebtedness within the meaning of the restriction upon the amount of indebtedness, the fact remains that, if the building is to be constructed, a contract liability must be incurred for that purpose, and, if the funds sought by the levy are to be paid for such construction, there must be an expenditure of more than \$40,000 for that purpose.

A dismal picture is presented of the confusion which will ensue if the approval of the electors must be had every time the county proposes to expend \$10,000 or more; and, as an example of such

confusion, it is said: "Assuming the statement made by the press to be true that Silver Bow expended last year more than \$100,000 on her poor, then it must be that such expenditure was unlawful, unless it followed upon a vote of the people, which probably did not take place." The only confusion suggested by this is a confusion of thought; for it is perfectly obvious that the distribution of various amounts for the relief of various indigent persons, even though the aggregate exceed \$10,000 taken from the county poor fund, is in nowise analogous to the expenditure of a sum certain for the single purpose of erecting a public building. The first is a distribution, founded on a duty expressly imposed, to meet an ever-present condition encountered in the regular and normal functioning of the county; the second is an expenditure, founded on a liability for a single, occasional purpose, forbidden under certain conditions. Such examples and similar arguments have, however, been advanced from time immemorial, to avoid some constitutional requirement. Under them any expenditure might be justified, any official act defended, and every safeguard designed to protect the public from prodigality be consigned to the limbo of political delusions. Happily, no such thing is possible, as yet. The Constitution still stands "mandatory and prohibitory," and section 5 of Article XIII is still intended to limit the power of every county, through any agency whatever, as to an expenditure for a single purpose to a certain figure, unless the approval of the people for such expenditure has been previously secured.

A question of practice has also been raised, but we do not deem it of sufficient importance to merit discussion.

The order appealed from is reversed, and the cause is remanded to the district court of Chouteau county, with directions to grant the temporary injunction.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied March 11, 1915.

STATE EX REL. PATTERSON, RELATOR, v. LENTZ, RESPOND-
ENT.

(No. 3,611.)

(Submitted February 2, 1915. Decided February 24, 1915.)

[146 Pac. 932.]

*Offices—Election Contests—District Judges—Vacancies—Ap-
pointment—Length of Term—Constitution—Statutes—Pub-
lic Policy—Notice—Governor's Proclamation—Presumptions
—Interpretation of Statutes.*

Offices—Creation of—Vacancies.

1. Upon the creation of an additional judgeship in a judicial district, a vacancy existed until filled by appointment by the governor, section 420, Revised Codes, enumerating the instances when vacancies occur, not being exclusive.

[As to what constitutes a vacancy in office, see note in 33 Am. Rep. 777.]

Interpretation of Statutes—Rule.

2. In the interpretation of statutes, every word therein used must be given some meaning, if possible.

[As to rules for construction of statutes, see note in 12 Am. St. Rep. 826.]

Offices—Creation—Power to Appoint—Length of Term—Constitution.

3. An act creating an additional district judgeship without provision touching the length of the term or expressly authorizing the appointment is sufficient warrant for the governor in making it, in the absence of expression therein importing futurity of selection; so likewise an expressed intention to authorize an appointment for a term longer than that contemplated by the Constitution is ineffective.

[As to power to appoint officers and whether it is essentially an executive function, see note in 13 Am. St. Rep. 125.]

Same—Length of Term—Constitution—Power of Legislature.

3a. An Act authorizing an appointment for a term longer than that contemplated by the Constitution is ineffective.

Same—District Judges—Appointment—Length of Term.

4. *Held*, under the constitutional and statutory provisions applicable, that a district judge appointed to fill a vacancy brought about by the creation of an additional judgeship, could serve only until the next general election in point of time, and until his successor was elected and qualified, and not until the next election at which the district judges generally were to be selected.

Same—Election and Appointment—Public Policy.

5. The general policy of the state government is that election to office, when it may be conveniently done, is the rule, and that appointments to fill vacancies shall be effective only until the people can elect.

Same—Appointment—Election—Contest—Estoppel.

6. A district judge appointed for a longer term than contemplated by the Constitution was not estopped from claiming title to the office in *quo warranto* proceedings, by the fact that he entered into a contest for

the office at the election occurring two years before his term under the appointment expired.

Same—Vacancies—Special Elections.

7. An election to fill a vacancy is a special election.

Same—Special Elections—Procedure—Statutes.

8. *Held*, that the provisions of sections 452-455, Revised Codes, sufficiently prescribe the mode for holding a special election.

Same—Vacancies—Elections—Proclamation—Duty of Governor.

9. In view of the provisions of sections 452 and 453 and 6269, Revised Codes, it is incumbent upon the governor to include in his election proclamation specific mention of the fact that in a particular judicial district a vacancy exists in the office of judge, then filled by an appointee, and that his successor is to be elected at the coming general election.

Same—General and Special Elections—Notice—Presumptions.

10. Though the electors are presumed to know what offices are usually to be filled at a general election, they cannot be presumed to know the fact that a special election is to be held to fill an office for an unexpired term.

Same—Elections—Proclamation—Insufficiency.

11. A statement in the proclamation of the governor giving notice of a general election, that among other officers there was to be elected "also a district judge in any judicial district where a vacancy may exist," was not such a notice of the necessity of filling a vacancy by election as required by sections 452, 453 and 6269, Revised Codes.

Same—Notice—Sufficiency—Contest Before and After Election—Rule.

12. After an election has been held, the rule as to the necessity of official proclamation and notice thereof does not apply with the same rigor as where the proceedings are attacked before its occurrence, the rule being that no informality in the election will suffice to defeat the popular will as expressed by their votes, if in fact it appears that they had actual, though not official, notice, and voted generally.

Same—Elections—Notice—Sufficiency—Evidence.

13. Evidence in an election contest *held* sufficient, under the rule above, to show that the electors had actual notice of an election to fill a vacancy in the office of district judge then held by appointment, though the official notice did not meet statutory requirements, and though the number of votes cast for the candidates for this office, when compared with the number received by a candidate for an office of like dignity, was small.

Original application in *quo warranto* by the State, on the relation of John E. Patterson, against Theodore Lentz, to determine title of respondent to the office of judge of the Fourth Judicial District. Judgment for respondent, Theodore Lentz.

Messrs. Hall & Whitlock, for Relator, submitted a brief; *Mr. A. N. Whitlock* argued the cause orally.

It is suggested by respondent, that the sentence in section 34, Article VIII, Constitution, which provides that persons appointed to fill a vacancy shall hold until the next general election and

until his successor is elected and qualified, is controlling in this case and is absolutely mandatory, requiring an election to be held at the next biennial election, which in this case would be November, 1914, for the purpose of filling the vacancy. Our contention in this regard is that the phrase, "next general election," as used in the Constitution, means the next general election for the office in question. This construction of the above phrase has been applied not only in our own state but in a number of others, and the trend of modern authority seems to be that way. In the case of *State ex rel. Livesay v. Smith*, 35 Mont. 523, 10 Ann. Cas. 1138, 90 Pac. 750, this construction was given to the same language when used in the Act creating the county of Sanders, and in that case the office in question was the office of clerk of the court, the term being the same as that of the district judge, and, as the court held, measured thereby. The holding of the *Livesay Case* has up to this time not been overruled, and stands as the law on the point in question. Moreover, as above stated, it has the support of considerable authority in other jurisdictions to which reference will be made. The case has frequently arisen in California, the first case being *People v. Mathewson*, 47 Cal. 442. In the case of *People v. Budd*, 114 Cal. 168, 34 L. R. A. 46, 45 Pac. 1060, the words construed were "the next general election by the people," and they were held to mean the next election for the particular office. To these cases should be added the case of *People v. Col*, 132 Cal. 334, 64 Pac. 477, in which the court said that the phrase, "next general election," as used in a statute for filling a vacancy in county offices, "refers to the general election for filling a particular office to which the person is appointed, or, in other words, to the general election provided for as to all county officers." The supreme court of Washington has reached a similar conclusion in the case of *State v. Howell*, 59 Wash. 495, 50 L. R. A. (n. s.) 336, 110 Pac. 386. The supreme court of Nevada in the case of *State v. Collins*, 2 Nev. 351, has arrived at the same conclusion. In Kansas the rule is laid down in *State v. Cobb*, 2 Kan. 32, and in *Matthews v. Board of Commissioners*, 34 Kan. 606, 9 Pac. 765. To the same effect, see *Wain-*

wright v. Fore, 22 Okl. 387, 97 Pac. 831; *State v. Gardner*, 3 S. D. 553, 54 N. W. 606, *Ransdell v. Ariail*, 13 La. Ann. 459. The earlier cases most frequently cited on this point are *People v. Wilson*, 72 N. C. 155, and *State v. Philips*, 30 Fla. 579, 11 South. 922, which cases are cited in the *Livesay Case* above referred to.

Let us assume, for the purposes of this argument, that this court should overrule the *Livesay Case* in so far as the meaning of the term, "next general election," is concerned, and should hold that under the Constitution Mr. Patterson's appointment was good only until the next biennial election for November, 1914, at which time his successor to fill the rest of the vacancy should be elected. Notwithstanding such a holding we take it that it is admitted that unless Mr. Lentz was duly elected to the office, Mr. Patterson, the then incumbent, would hold over upon the failure to elect his successor. In *Board of Election v. Wayne Circuit Judges*, 172 Mich. 430, 137 N. W. 1089, it is held that a mere temporary appointment to fill a vacancy is not terminated by an invalid election of a successor. The same is held where an election to fill a vacancy is held at a time not fixed by law for such an election. (*People v. Mathewson, supra*; *Lynam v. Commonwealth* (Ky. App.), 55 S. W. 686; *State v. Collins*, 2 Nev. 351; *People v. Hardy*, 8 Utah, 68, 29 Pac. 1118.) The same is held where there is no constitutional provision for filling a vacancy by election, and the statute provides that a person appointed to fill a vacancy shall hold his office until his successor is elected and qualified, it being held in such a case that the appointee will hold until the time which is regularly fixed for the qualification of persons regularly elected to the office. (*State ex rel. Ellis v. Commrs. of Muskingum County*, 7 Ohio St. 125.) It is likewise held where a successor is elected at a special election for which the governor issued no proclamation. (*Kenfield v. Irwin*, 52 Cal. 164.) If, then, we are able to establish either that there is nothing in the Constitution or laws of the state of Montana providing for an election to fill a vacancy in the office of judge of the district court, or that no

mode or method is provided by the laws of the state for holding such an election, or that the statutory requirements with reference to notice of such an election were not followed, then it necessarily follows that there was no valid election of Mr. Lentz in this case.

Now, if there is any provision in the Constitution making it mandatory that an election shall be held to fill a vacancy in the office of district judge, it must be section 34, Article VIII, but upon examination it will be found that that section simply provides that one appointed to fill a vacancy shall hold until the next general election, *etc.*, and that the person elected to fill a vacancy shall hold until the expiration of the term for which the person he succeeds was elected. Neither of these provisions says expressly that an election shall be held to fill a vacancy in the office of a district judge, nor do they provide any time or manner of holding such an election. It is true that section 6269 has a provision by the state legislature as to when an election to fill such a vacancy shall take place, but, as shown above, the operation of such section would be suspended in this case by the later Act, as referred to in this brief. Moreover, this section refers only to such vacancies as are defined in section 420, Revised Codes. We also have section 451, but that section does not designate the officer or authority who is to give notice as to the time of holding special elections or the vacancy to be filled. This difficulty is not met with in the case of vacancies in county officers, nor in the case of senators or representatives, because the proper authority in such cases is specifically designated. If there is no provision in this state authorizing any person to designate the office as vacant or to require it to be filled by special election, or to issue a call for a special election to fill such vacancy, then there is no mode or manner provided by law for supplying such office. (*People v. Budd*, 114 Cal. 168, 34 L. R. A. 46, 45 Pac. 1060.)

There can be no election in the absence of valid authority for holding it, the right to hold the same never being implied. (*State v. Gardner*, 3 S. D. 553, 54 N. W. 606.) The case of

Matthews v. Board of Commrs., 34 Kan. 606, 9 Pac. 765, is an interesting one on the necessity of authority to hold an election. The most recent case upon this subject is the case of *Budge v. Gifford* (Ida.), 144 Pac. 333. The provisions of law in the states referred to were very similar to those in our own, and in view of these holdings and the statement in the case of *State v. Kehoe*, 49 Mont. 582, 144 Pac. 162, we believe we are correct in our contention that it is not possible under the laws of our state to hold a valid election for filling a vacancy in the office of district judge.

We submit, finally, that if our last contention is not sustained, then the election in this case being an election to fill a vacancy was a special election, requiring notice thereof to be given to the electors, and that no proper notice was given by anyone in authority, and that therefore, and as a result thereof, no valid election was held, in which case the plaintiff holds over.

In *State v. Kehoe*, above referred to, the court makes it perfectly clear that notice is necessary in the case of special elections, although the same may be held at the same time as regular elections, and it also makes it clear that an election to fill a vacancy is a special election. (See, also, *People v. Weller*, 11 Cal. 49, 70 Am. Dec. 754; *State ex rel. Sampson v. Superior Court*, 71 Wash. 484, Ann. Cas. 1914C, 591, 128 Pac. 1054; *People v. Porter*, 6 Cal. 26; *People v. Kerwin*, 10 Colo. App. 472, 51 Pac. 530; *Beal v. Morton*, 18 Ind. 346; *Cook v. Mock*, 40 Kan. 472, 20 Pac. 259; *Wilson v. Brown*, 109 Ky. 229, 139 Ky. 397, 58 S. W. 595; *Secord v. Foutch*, 44 Mich. 89, 6 N. W. 110; *Board of Commrs. v. Wayne Circuit Judges*, 172 Mich. 430, 137 N. W. 1089; *State ex rel. Bolton v. Good*, 41 N. J. L. 296.)

The relator was appointed for a term to expire the first Monday of January, 1917. The electors knew this situation as a matter of fact, and the law presumes that they knew of the Act creating the judgeship and also that judges were to be elected only on presidential years, and many refrained from voting at all, not knowing the appointee had to be re-elected. Besides, the

electors knew and had a right to believe that the appointment and commission to the relator until 1917 would stand until at least they were notified to the contrary. The only way this could have been accomplished was by proclamation and notice, and as no proclamation or notice were given, the electors had a right to rely upon the Act creating the judgeship and the appointment thereunder, and had a right to refuse to consider the election for such office as valid and proper. (See *People v. Weller*, *supra*.)

Messrs. Wm. Wayne, Edw. C. Mulroney and Derwood Washington, for Respondent, submitted a brief; Mr. Wayne argued the cause orally.

We assert that *State ex rel. McGowan v. Sedgwick*, 46 Mont. 187, 127 Pac. 94, and *State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 144 Pac. 162, are conclusive upon the question of the term of office of the appointee, under section 34, Article VIII, Constitution, and section 6269, Revised Codes. In asserting the conclusiveness of these authorities, we are not unmindful of the case of *State ex rel. Livesay v. Smith*, 35 Mont. 523, 10 Ann. Cas. 1138, 90 Pac. 750. That case involved the question of the term of office of a clerk of court in Sanders county. When the county of Sanders was created the office of clerk of the district court was filled by the legislature and the question was as to his term of office. Mr. Justice Smith, writing the opinion of the court, held that the phrase, "the next general election," meant "the next general election held in conformity with the general law for filling that particular office in that judicial district." We think the holding in that case is contrary to the policy of the law, which contemplates the preservation of the right of the people to elect their elective officers at the earliest convenient time and the prevention of the substantial emasculation of that right by an extension of the appointing power. We further maintain that the authority of the case is destroyed by the *McGowan* and *Kehoe* Cases, cited *supra*. (See, also, *State ex rel.*

Linn v. Mullett, 20 Wash. 221, 54 Pac. 1124; *Morgan v. Board of Commrs.*, 24 Kan. 71; *State v. Perkins*, 139 Mo. 106, 40 S. W. 660.)

Calling and notice of election: A consideration of this matter naturally divides itself into two subheads, and it will be so considered.

(a) *Governor's Election Proclamation.* It is our contention that if any call were necessary for an election to fill the office of district judge in the fourth judicial district, under the circumstances of this case as they will be hereinafter developed, the governor's proclamation in this respect was ample and sufficient. By it the people are advised that the election being called is expressly for the purpose, *inter alia*, of electing district judges in any and all districts where a vacancy exists. The proclamation says to the people: "If there is any vacancy in the office of district judge in your district, one of the purposes of the election now being called is to fill that vacancy." It is true that this court in the very recent case of *State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 144 Pac. 162, has said: "But they [the people] cannot be presumed to know generally that a vacancy has occurred which they may fill at the date of the general election, though they are presumed to know the date when the election takes place." A distinction must be borne in mind here between vacancies occurring by reason of the death, resignation or removal of an incumbent, and vacancies occurring by operation of law. Of the former vacancies the people cannot be presumed to have notice; of the latter vacancies they are charged with notice. The vacancy to occur in the office of district judge in the fourth judicial district at the election to be held on November 3, 1914, and upon the election and qualification of a successor was a vacancy created by operation of the Act creating this judgeship (Sess. Laws 1913, p. 14); Const., Art. VIII, sec. 34, which expressly fixes the termination of the term of office of an appointee to fill a vacant district judgeship as "the next general election and until his successor is elected and qualified," and Revised Codes, section 6269, providing that an election to

fill a vacancy in the office of district judge "must take place at the next succeeding general election." The people were, therefore, charged under the law with knowledge of three things, to-wit: (a) The creation of this additional district judgeship and its vacancy, *ipso facto*, on its creation (Sess. Laws 1913, p. 14); (b) that the term of relator would expire at the election to be held November 3, 1914, and the election and qualification of a successor; and (c) that the election of a successor must take place at this election. (*Court of Commrs. of Colbert County v. Thurmond*, 116 Ala. 209, 22 South. 558; *Adsit v. Board of State Canvassers*, 84 Mich. 420, 11 L. R. A. 534, 48 N. W. 31; *People v. Hartwell*, 12 Mich. 508, 86 Am. Dec. 70.) The people, therefore, knew, by being charged with notice thereof, that there would be a vacancy in this office, and they knew from a reading of the governor's proclamation that a judge to fill such vacancy was to be elected at such election. It therefore follows that the governor's proclamation was ample and sufficient in all respects as a call for an election to fill the office of district judge in the fourth judicial district. (*Brown v. Street Lighting Dist.*, 70 N. J. L. 762, 58 Atl. 339; *Berry v. McCullough*, 94 Ky. 247, 22 S. W. 78; *State v. Thayer*, 31 Neb. 82, 47 N. W. 704; *People v. Cowles*, 13 N. Y. 350; *Cocley's Const. Lim.*, 6th ed., p. 759.)

(b) *Election Notices.* In addition to the notice conveyed by the governor's proclamation and the knowledge with which the voters were charged as to the matters heretofore discussed, the election notices posted in every precinct in each of the counties of Ravalli and Mineral by order of the boards of county commissioners of said counties, under the provisions of Revised Codes, section 452, expressly named "One judge of the fourth judicial district" as one of the officers to be elected at said election. These election notices were officially issued and posted in each of the precincts in Ravalli and Mineral counties. The calling and notice of election in these two counties, therefore, wholly complied with the most exacting requirements of official notice.

Finally, it should be noted on this phase of the discussion that official notice of an election to fill a vacancy in the office of district judge is nowhere required. A search for any requirement of official notice either in the Constitution or the statutes is in vain. It is entirely competent for the legislature to dispense with all official notice of such an election. (*Powell v. Jackson Common Council*, 51 Mich. 129, 16 N. W. 369.) The absence of any requirement of official notice of such an election would, in itself, distinguish the instant case from that of *State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 144 Pac. 162, where the decision is based upon the mandatory requirement of notice.

Insufficiency or lack of call; cure by actual notice: Assuming now, however, for the purposes of the argument, that the proclamation of the governor was insufficient as a call for an election to fill this office, and also that some further official notice of such an election should have been given, what is the result of such claimed insufficiency or lack? Insufficiency of the call or notice of election does not, *ipso facto*, render the election invalid. On the contrary, actual notice to the voters and general participation in the election cures insufficiency, or lack of, official call or notice. (*Adsit v. Board of State Canvassers*, 84 Mich. 420, 11 L. R. A. 534, 48 N. W. 31.) In the instant case the relator is in the unfavorable position of having invited an election to fill this office by filing his nominating petition as the first candidate, then of having done his best to give general notice throughout the district of his candidacy and the fact that the office would be filled at the ensuing election, of having addressed meetings in his own behalf announcing these facts, of having made similar announcements in the newspapers and by the distribution of campaign cards, and then when the people accepted his representations in regard to the matter and the election had been held on the faith of his representations thus made, repudiating the whole thing and blandly telling the people that there could be no election for this office, as his term would not expire for two years more, and that the campaign for and election of a judge was merely engaged in as a more or less

pleasant pastime. (*State ex rel. Berge v. Lansing*, 46 Neb. 514, 35 L. R. A. 124, 64 N. W. 1104; *People v. Brenham*, 3 Cal. 477; *Odell v. Rihn*, 19 Cal. App. 713, 127 Pac. 802; *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 58 Am. St. Rep. 39, 47 Pac. 958; *State v. Skirving*, 19 Neb. 497, 27 N. W. 723; *Commonwealth v. Smith*, 132 Mass. 289; *Dishon v. Smith*, 10 Iowa, 212; *Berry v. McCollough*, 94 Ky. 247, 22 S. W. 78; *State v. Thayer*, 31 Neb. 82, 47 N. W. 704; McCrary on Elections, 3d ed., par. 143 *et seq.*)

Relator's right to raise question: Finally, we come now to the question whether, in any event, the relator is in a position to raise the question of the sufficiency of the call for and notice of said election. Relator nowhere alleges or even intimates that he was misled in any way by reason of the claimed insufficiency of the call and notice of this election; nor that he was deprived of the right to vote for said office by reason thereof; nor that a sufficient number of other voters were so misled or deprived of the privilege of voting for said office to have changed the result. In this situation defendant contends that the relator is not entitled to raise this question at all, for he shows no injury resulting from the insufficiency of said call and notice, assuming it to have been insufficient. (*Reid v. Lincoln County*, 46 Mont. 31, 125 Pac. 429; *Potter v. Furnish*, 46 Mont. 391, 128 Pac. 542.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an original proceeding in the nature of *quo warranto* to determine the title of respondent to the office of judge of the fourth judicial district. After the issues had been made up, the parties entered into a stipulation as to the facts, and settled them in a formal written statement. The controversy was submitted on this statement, which discloses the following: By an Act approved February 11, 1913 (Laws 1913, Chap. 14, p. 14), a third judgeship was created in the fourth judicial district. Section 2 of the Act provides: "The governor shall appoint some fit and qualified person as additional judge of the said fourth judicial

district to hold his office until the first Monday of January, 1917, or until his successor is duly elected and qualified." On February 21, in pursuance of the Act, the governor appointed the relator to the office, the commission issued to him stating that he was to hold the same until the first Monday in January, 1917. The relator qualified at once and entered upon and continued in the discharge of the duties appertaining to the office, until this controversy arose. Prior to the general election held on November 3, 1914, no party nominations were made for the election of a successor to the relator; but more than thirty days prior to the election the relator, the respondent, and Welling Napton, Esq., all possessing the necessary qualifications for the office, circulated petitions and secured the number of signatures required to nominate themselves as independent candidates. In due time these petitions were filed with the secretary of state, and thereafter the names of all the nominees were by him duly certified to the clerks of the counties composing the district, viz., Missoula, Ravalli, Sanders and Mineral, to be printed upon the official ballots in the appropriate column with other independent candidates. Theretofore, and on August 6, the governor had issued his proclamation calling for the general election for November 3. The proclamation enumerated all the officers to be elected throughout the state, including state, district and county officers, but contained no reference to the office of district judge, other than the following: "Also a district judge in any judicial district where a vacancy may exist." Within the time required by law, the proclamation was published, and notice of the election was posted in the voting precincts in the several counties, by authority of their respective boards of commissioners. In Ravalli and Mineral counties the notices informed the electors that one judge was to be elected in the district. This information was omitted from those published and posted in Sanders and Missoula counties. In all the counties the official ballots had printed upon them a separate column headed "Independent," except that in Mineral county the heading was "Independent Party." The names of the candidates appeared

therein under the designation, "For Judge of the Fourth Judicial District." During the thirty days preceding the election, the several candidates were active in bringing their respective claims to the attention of the electors throughout the district, by advertisements and notices published at the various county seats and at other towns in the district. These publications were made at the instance of the candidates themselves or of friendly advocates of their respective claims. The statement published at the instance of the relator called the attention of the electors to the fact (which it was suggested many of them did not know) that the office of district judge then held by him was put in issue at that time. It also stated, in substance, that while the relator was of the opinion that his tenure under his appointment would not expire until the first Monday in January, 1917, since a question had arisen on the subject too late to permit him to present himself for nomination on the Democratic ticket, in order to avoid all future question as to his right he was seeking an election on the Independent ticket to succeed himself. The relator also caused to be distributed among the electors 7,500 cards, announcing his candidacy. These cards had printed upon them the substance of the statement referred to above. The respondent had distributed in the same way 8,000 cards, announcing his candidacy, and he also caused to be posted, in prominent places in every precinct in the district, placards upon which were printed his portrait and the announcement of his candidacy. Napton caused to be distributed 6,000 candidate's cards. The relator and the respondent each wrote and mailed to individual electors in the district many hundreds of personal letters, announcing their respective candidacies and urging their claims, In addition to these means of publicity, the several candidates visited a great number of the precincts in the district; the respondent visiting all, except five small ones in remote localities. Candidates for other offices, as well as party speakers, who participated in the campaign for state and local offices, on many occasions and in different places called the attention of the electors to the necessity of voting for some one of the candidates

for the office of district judge. The numbers of registered voters in the counties were: In Missoula county, 4,198; Ravalli county, 2,344; Sanders county, 1,353; Mineral county, 720—a total of 8,615. The votes cast for the office of district judge were: In Missoula county, 1,749; Ravalli county, 582; Sanders county, 221; Mineral county, 537—a total of 2,889, or an average of 33 $\frac{1}{3}$ per cent of the whole number of registered votes. The votes cast for the candidates in each county were:

	Missoula County.	Ravalli County.	Sanders County.	Mineral County.
Lentz.....	770	134	61	357
Patterson.....	640	220	135	118
Napton.....	339	228	25	62

For the office of associate justice of the supreme court, three candidates, whose names appeared on the party tickets, received, in Missoula county, 3,698; Ravalli county, 1,735; Sanders county, 1,135; Mineral county, 487—a total of 7,055, or an average of about 82 per cent of the whole number of registered votes. Upon the ascertainment by the state board of canvassers of the result, the governor issued a certificate of election to the respondent. He thereafter took the oath of office, and on January 4 of this year assumed possession of and began to discharge the duties appertaining to it.

The claim is made that by his appointment by the governor under authority of the statute, *supra*, the relator became entitled to hold until the first Monday in January, 1917, and that the respondent has unlawfully intruded himself into and usurped the office. The claim is also made that the admitted facts disclose that, in so far as the election included candidates for the office of district judge, it was invalid, in that it had not been proclaimed by the governor, and hence that the right of the relator to retain the office under his appointment was not affected by it.

As we understand counsel for the relator, they concede, at least do not controvert, the proposition that, upon the approval [1] of the Act creating the additional judgeship, there was *ipso facto* a vacancy in the office until it was filled by the gov-

error by appointment. We shall not stop to consider again the question whether this is so. Whatever may be the rule in other jurisdictions, we deem it settled in this state by the decision in *State ex rel. Buckner v. City of Butte*, 41 Mont. 377, 109 Pac. 710. An office without an incumbent is vacant, whether it never had an incumbent or the vacancy has been caused by death of the incumbent or by the happening of any other one of the contingencies enumerated in section 420 of the Revised Codes, or is the result of the failure of the electors to choose a successor to the incumbent, when the term attached to the particular office has expired and the incumbent is not authorized to hold over until his successor has been elected and qualified. For, though the statute declares that a vacancy occurs upon the happening of any of the events therein enumerated, it is by no means exclusive, as is apparent from the decision in *State ex rel. Jones v. Foster*, 39 Mont. 583, 104 Pac. 860, wherein it was held that, since the Constitution fixes the term of the clerk of the district court at four years, a vacancy occurs, upon the expiration of four years, to be filled by appointment, if the people fail to elect a successor to the prior incumbent. As soon as a vacancy occurs, the appointing power may act (Const., sec. 7, Art. VII); but since, as we shall see later, the Constitution does not distinguish vacancies into different classes on account of the exigencies which occasion them, the term for which the appointment holds good is governed by the limitations upon the appointing power therein prescribed.

There can be no doubt, we think that by the Act, *supra*, creating the additional judgeship, the legislature intended that the appointment made by the governor should hold good until the first Monday in January, 1917, and until a successor should be elected and qualified. The person who drafted the Act doubtless inadvertently used the disjunctive "or" instead of the conjunctive "and," as found in the Constitution, where the clause following the conjunctive is used in fixing the tenure of persons appointed to vacancies in elective offices. The two other alternatives are either to attach no meaning at all to this clause, or else

to hold that the legislature intended to provide by implication that a successor to the first appointee should be chosen by the people at the next general election following the appointment. The first of these latter alternatives we cannot accept, because every word in a statute must be given some meaning, if it is possible to do so (*State ex rel. Anaconda C. Min. Co. v. District [2] Court*, 26 Mont. 396, 68 Pac. 570, 69 Pac. 103); nor can we accept the second, because the legislature would doubtless have expressly so provided if it had intended that a successor to the governor's appointee should be elected at the next general election. Evidently it entertained the view that the expression, "next general election," was to be given the import assigned to it by this court in *State ex rel. Livesay v. Smith*, 35 Mont. 523, 10 Ann. Cas. 1138, 90 Pac. 750, viz., the next general election of district judges throughout the state. This case we shall have occasion to consider later. We have said this much because counsel have devoted some space in their briefs to a discussion of the meaning of the clause referred to. It is not important, however, to determine just what the intention of the legislature was. The vital question at issue on this branch of the case is whether, under the express limitation of the Constitution, the governor's appointee could hold for the remainder of the term or only until his successor, elected at the biennial election, had qualified. An Act creating the office without any provision touching the length of the term, or expressly authorizing the [3] appointment, would have been sufficient warrant for the action of the governor in making it, in the absence of some expression in the Act importing futurity of selection. (*People ex rel. Snyder v. Hylan*, 212 N. Y. 236, 106 N. E. 89.) The failure of the legislature to give authority would not of itself impose a limitation upon the power of the governor. For the [3a] same reason, any expressed intention to authorize an appointment for a longer term than the fundamental law contemplates is ineffective.

The provisions of the Constitution pertinent here are the following: "The state shall be divided into judicial districts, in

each of which there shall be elected by the electors thereof one [4] judge of the district court, whose term of office shall be four years, except that the district judges first elected shall hold their offices only until the general election in the year one thousand eight hundred and ninety-two (1892), and until their successors are elected and qualified. Any judge of the district court may hold court for any other district judge, and shall do so when required by law." (Art. VIII, sec. 12.)

"Vacancies in the office of justice of the supreme court, or judge of the district court, or clerk of the supreme court, shall be filled by appointment, by the governor of the state, and vacancies in the offices of county attorneys, clerk of the district court, and justices of the peace, shall be filled by appointment, by the board of county commissioners of the county where such vacancy occurs. A person appointed to fill any such vacancy shall hold his office until the next general election and until his successor is elected and qualified. A person elected to fill a vacancy shall hold office until the expiration of the term for which the person he succeeds was elected." (Art. VIII, sec. 34.)

The sections of the Revised Codes enacted to give effect to these provisions are: "The term of office of judges of the district court begins on the first Monday of January next succeeding their election." (Rev. Codes, sec. 6267.)

"If a vacancy occur in the office of judge of a district court, the governor must appoint an eligible person to hold the office until the election and qualification of a judge to fill the vacancy, which election must take place at the next succeeding general election, and the judge so elected holds office for the remainder of the unexpired term." (Sec. 6269.)

Section 450 declares what is a general election, and fixes the time for holding it, viz.: "The first Tuesday after the first Monday of November, in the year 1894, and in every second year thereafter."

Section 451 defines a special election as one held to supply a vacancy in an office.

Section 12 of Article VIII, *supra*, was considered in connection with other provisions of the Constitution, in *State ex rel. Jones v. Foster*, cited above. It was there said: "In adopting it the convention had three purposes in view: (1) To provide for the division of the state into districts; (2) to provide for district judges and to fix their term of office; and (3) by way of exception, to fix the term of office of those first elected, so that they would hold until the general election in 1892, and until their successors should be elected and qualified. But for the exception, those first elected would also have held for the term of four years. The purpose of it was to so adjust the term of those first elected that thereafter the election would fall regularly upon presidential years, and be uniform throughout the state." It was also held that the clause, "and until their successors are elected and qualified," is a part of the exception, and does not modify the clause definitely fixing the term of the judges to be subsequently elected. The result is that, upon the expiration of the four-year term, the office of district judge becomes vacant by operation of law. In *State ex rel. McGowan v. Sedgwick*, 46 Mont. 187, 127 Pac. 94, the court considered at length the several provisions of the Constitution, including section 34 of Article VIII, *supra*, relating to vacancies in office, to the tenure of persons appointed to fill them, and to the time when their successors are to be chosen by the people. Speaking through Mr. Justice Holloway the court said: "A reference to the several provisions of the Constitution above discloses that in every instance of a vacancy in an elective office, where the vacancy is to be filled by appointment, the appointee shall hold only until the people who elected his predecessor have the first opportunity to fill the office with a person of their own choice; and this rule is general, applies to every state, district and county office, unless an exception is made in favor of one appointed to a vacancy in the office of county commissioner. There is not any reason apparent or suggested why an exception in his favor should be made, and that there is not any express exception is conceded."

The personal view of the writer, as expressed in *State ex rel. Rowe v. Kehoe*, 49 Mont. 582, 144 Pac. 162, is that the rule includes also county offices, the term of which is only two years. However this may be, the general policy of our government, as [5] indicated by these provisions, is that election to office by the people, when it may be conveniently done, is the general rule, and that appointments to fill vacancies made to meet the requirements of public business shall be effective only until the people may act. (*State ex rel. McGowan v. Sedgwick, supra.*) That this was the intention of the convention is clearly indicated by the last two sentences in section 34, *supra*. By the first, the term of the appointee is definitely limited to the occurrence of the general election and the lapse of sufficient time thereafter for the qualification of the elected incumbent, whereas, under the latter, the elected incumbent holds for the remainder of the term. The first implies, also, that, if the elected incumbent for any reason fails to qualify, the title of the appointee holds good to the end of the term; but, though this is so, his title lapses upon the election and qualification of his successor. Therefore, the provision being exclusive and hence prohibitory (Const., Art. III, sec. 29), the legislature cannot extend the term beyond that thus definitely fixed. The governor is equally without power to do so.

There is a conflict in the decisions as to the meaning of the phrase, "until the next general election," as used in section 34, *supra*, and elsewhere in the Constitution, one view being that it means the next general election in point of time, and the other that it means the next general election for the particular office. A number of cases illustrating these divergent views are cited in the note to *Wendorff v. Dill*, 50 L. R. A. (n. s.) 359, (83 Kan. 782, 112 Pac. 588), among them *State ex rel. Livesay v. Smith, supra*. In this case it was definitely held that the expression refers to the next general election for the particular office; in that instance, clerk of the district court. That the court in so holding fell into error becomes apparent when we recognize and give force to the general theory of the Constitution on the subject of how vacancies in office are to be filled, and realize that

the rule adopted in that case renders it impossible ever to hold an election to fill a vacancy in any of the offices enumerated in section 34, *supra*. Obviously, if an appointee to fill a vacancy in any of the offices enumerated is entitled to hold until the general election for that office at which is chosen an incumbent for the ensuing regular term, a vacancy in any one of them can never be filled by election as distinguished from appointment, with the result that the last sentence in the section is entirely without meaning. The preceding sentence would then be read: "A person appointed to fill any such vacancy shall hold his office until the expiration of the current term, and until his successor shall be elected and qualified." And the last sentence would be disregarded as entirely without meaning. This may not be done, for it would violate the fundamental rule of construction applicable, *viz.*, that effect must be given, if possible, to the whole instrument under consideration and to every section and clause of it. (*State ex rel. Anaconda C. Min. Co. v. District Court, supra*; *Montana Coal & C. Co. v. Livingston*, 21 Mont. 59, 52 Pac. 780; Cooley's Const. Limitations, p. 72.) The conclusion announced in *State ex rel. Livesay v. Smith* was the result of oversight, in failing to notice the import of the last sentence in the section. For this reason it was erroneous, and the decision must be overruled.

It will be noted that the provision mentions vacancies generally, without regard to what may be the cause of them. Hence, as was stated above, it must include a vacancy which exists in a newly created office for which no incumbent is named. If the legislature had merely created the office and said nothing as to the appointment, or, besides creating the office, had added that the incumbent appointed by the governor to fill it should hold until the next general election and until his successor should be elected and qualified, the Act would not only have been in conformity with the evident intention of the provision of the Constitution, but also in entire harmony with the interpretation given it by the legislature itself in enacting section 6269 of the Revised Codes, *supra*. Interpreted, as it must be, to mean that the gov-

error was to fill the office for the remainder of the term, it is to this extent invalid, though it must be conceded that the relator was entitled by virtue of his appointment, under the terms of the Constitution, to hold until he had been displaced by a successor legally elected by the people. The clause, "and until his successor is elected and qualified," is an express guaranty of this right. (*Board of Election Commrs. v. Wayne Circuit Judges*, 172 Mich. 430, 137 N. W. 1089; *People v. Mathewson*, 47 Cal. 442; *State v. Collins*, 2 Nev. 351; *People v. Hardy*, 8 Utah, 68, 29 Pac. 1118.)

In this connection it may be remarked that the relator is not [6] estopped from claiming title to the office under his appointment, by the fact that he entered into the contest for it with his opponents. If the election was void for any reason, it conferred no right upon the respondent. The conduct of the relator did not amount to a resignation. His title remained perfect until he had been displaced by a successor elected by the people in pursuance of a method declared or recognized by law to be effective of that result. The doctrine of estoppel has no application. Neither does the certificate issued to the respondent by the governor affect relator's right. It is nothing more than the written evidence of title which the governor, as chief executive of the state, is authorized to issue to a successful candidate upon the ascertainment of the result of an election. If the election is void, the governor is not required to issue a certificate, and, if he does, it confers no right. The appointee cannot be divested of his title otherwise than by resignation or the happening of some other one of the contingencies enumerated in section 420 of the Revised Codes, cited heretofore.

One basis of the contention that the election was void is the assumption that, in so far as it included a district judge, it was without authority of law, because the phrase, "until the next general election," means the next election at which district judges are to be elected throughout the state. This contention has been disposed of by the foregoing discussion.

Under the interpretation we have given the provision of the Constitution, the people were entitled to elect some person to fill

the office at the election in November, 1914. The legislature, in enacting section 6269, *supra*, which was left unchanged by the invalid provision of the Act of 1913, specifically required that it should be held. Whether or not the result was effective to vest the respondent with title depends upon the answers which must [7] be given to these questions:

- (1) Is an election to fill a vacancy a special election?
- (2) Has the legislature sufficiently prescribed the mode for holding such an election?
- (3) Was this mode substantially pursued by the election officers, in the making of proclamation and giving notice? And
- (4) Even though the formalities of proclamation and notice were omitted, must we, now that the election is over, accept the result as an authoritative declaration of their wishes by the people?

The first of these inquiries is answered in the affirmative by the statute (Rev. Codes, sec. 451), which declares: "Special elections are such as are held to supply vacancies in any office, and are held at such times as may be designated by the proper officer or authority."

The second must also be answered in the affirmative. In *State ex rel. Rowe v. Kehoe, supra*, the various provisions of the Codes [8] relating to the manner of calling special elections (sections 452-455) to fill vacancies in county offices were considered. It was said that, while they are crude and do not in the most appropriate terms confer the necessary power upon the boards of county commissioners, nevertheless they are sufficient for this purpose. With reference to the duty of the governor, under section 452, it was said that apparently proclamation is required of him only when it is necessary to fill offices for the regular ensuing term. When, however, we consider sections 452 and 453 in connection with the provision of the Constitution and the statute (section 6269) relating to the filling of the office of district judge held by an appointee of the governor, it becomes clear that it is incumbent upon the governor to include in his proclamation [9] specific mention of the fact that in a particular district,

where this condition exists, an election is to be held to fill the office for the rest of the term. He is the proper authority to proclaim the regular election for all officers, and section 6269 makes it incumbent upon him to include in his proclamation mention of the fact that a state office held by his appointee is to be filled by election. The several provisions of the Constitution, by specifically fixing the tenure of an appointee to office to fill such a vacancy with reference to the general election, as specifically fix the date of that election as they do the date of the election of a successor, and make it as much the duty of the governor to include in his proclamation mention of the necessity to hold an election in a given district. Section 452 does not so declare in express terms; yet when we note that it does require proclamation of the general election, and also that section 6269 declares that the special election must be held at that time, the conclusion cannot be avoided. That section 452 also requires the governor to make special proclamation for an election to fill a vacancy in the office of state senator or member of the house of representatives does not at all imply that he is not to convey the information to the electors of a particular district when it is necessary for them to elect an incumbent for the office of district judge. It may be said that, since the date of the general election is fixed by section 450, the requirement of section 453 that the proclamation shall state the time of the election is superfluous; nevertheless the other requirement that the proclamation state [10] the offices to be filled is necessary for, though the people may be conclusively presumed to know what offices are usually to be filled at the general election, they cannot be presumed to know the fact that a special election is to be held to fill an office for an unexpired term. Hence the legislature required that they, or the portion of them interested, should be informed of the fact in order that they might exercise their right intelligently.

The third inquiry must be answered in the negative. The language of the proclamation, "also a district judge in any judicial [11] district where a vacancy may exist," embodies no statement of fact. It left the people in any district to ascertain

for themselves whether the emergency existed requiring them to elect a judge, instead of informing them definitely that such an emergency existed and that they should proceed with the election.

The answer to the last inquiry involves some difficulty. In *State ex rel. Rowe v. Kehoe*, *supra*, this court adopted the view that, since the statute requires official proclamation and notice of the election, in the absence of them the election would be invalid. The question in the case was whether, in the absence of official proclamation and notice of any kind, the clerk was authorized to print upon the ballot the names of two candidates to fill a vacancy in the office of sheriff. It was determined that he could not. The notice the electors would have in such case would depend entirely upon the disposition of the candidates themselves to give publicity to their candidacies. In that case the question at issue arose out of the proceedings of the clerk prior to the election. After the election has been held, however, the rule as to the [12] necessity of official proclamation and notice does not apply with the same rigor (*Potter v. Furnish*, 46 Mont. 391, 128 Pac. 542; *State ex rel. Kehoe v. Stromme*, 49 Mont. 25, 139 Pac. 1002); the validity of the result being determined by an ascertainment from the evidence, whether the electors generally had notice and generally indicated their choice of candidates. In the first instance, there is involved only the right of the candidates to have their respective names submitted to the electors. In the second, while the respective rights of the claimants to serve the people are at issue, there is involved the fundamental right of the people to be served by a person chosen by themselves in preference to one put into the office by the appointing power to meet a temporary emergency. The underlying principle is that, inasmuch as the people have the right to choose officers to serve them no informality in the election will suffice to defeat their will, as expressed by their votes, if in fact it appears that they had actual notice and did indicate their choice. This rule is especially applicable to cases in which the Constitution and statutes enacted in pursuance thereof require the election to be held on the date of the general election. So, while some of the courts hold that

want of official notice will vitiate the election after it has been held (*People v. Weller*, 11 Cal. 49, 70 Am. Dec. 754; *People v. Kerwin*, 10 Colo. App. 472, 51 Pac. 530; *Beal v. Ray*, 17 Ind. 554; *People v. Thompson*, 67 Cal. 627, 9 Pac. 833), the weight of authority is in favor of the rule that if it appears from the evidence that the people had actual notice that none of them have been misled, so that they refrained from voting on that account, and that they voted generally, even though it is apparent that many refrained from voting because of their indifference as to the result, the election should be upheld. The following cases, which arose out of conditions not essentially different from those disclosed in this case, support this rule: *Berry v. McCollough*, 94 Ky. 247, 22 S. W. 78; *Dishon v. Smith*, 10 Iowa, 212; *Rodwell v. Rowland*, 137 N. C. 617, 50 S. E. 319; *Commonwealth v. Smith*, 132 Mass. 289; *State v. Skirving*, 19 Neb. 497, 27 N. W. 723; *State v. Lansing*, 46 Neb. 514, 35 L. R. A. 124, 64 N. W. 1104; *State v. Doherty*, 16 Wash. 382, 58 Am. St. Rep. 39, 47 Pac. 958; *Adsit v. Board of State Canvassers*, 84 Mich. 420, 11 L. R. A. 534, 48 N. W. 31; *State v. Thayer*, 31 Neb. 82, 47 N. W. 704; *State v. Orvis*, 20 Wis. 235; *Jones v. Gridley*, 20 Kan. 584; *People v. Cowles*, 13 N. Y. 350. (See, also, McCrary on Elections, sec. 143; Mechem on Public Officers, sec. 174.) From an examination of these cases, it is apparent that the inquiry in each of them was directed to ascertain whether the circumstances justified the inference that the people had actual notice. The rule observed in them, we think, should be applied to this case.

In two of the counties of the fourth district the notice posted [13] in the several precincts announced that a judge was to be elected. During the thirty days preceding the election all of the candidates were active in giving publicity to this fact throughout the district. Cards were distributed by them liberally, in all more than 20,000. Notices were published in various newspapers throughout the district. Public speakers called the attention of the voters to it. Hundreds of personal letters were written by the candidates to individual electors. The respondent visited every precinct in the district in the interest of his

candidacy, except five small ones, and in all of them in prominent places were posted his announcement. The other two candidates visited a great number of precincts. Finally, there was put into the hands of every voter on election day a ballot upon which were printed the names of the candidates in a separate column under the proper designation, so that each elector who cast a vote had only to use his eyes to see that he was entitled to vote for one person for the office of district judge. Added to this, both by the Constitution and section 6269, *supra*, every voter was notified that he was entitled to vote for one candidate for every office named upon the ballot. Aside from the omission of the formal proclamation and notice anterior to the election, we have here disclosed all the concomitants that usually accompany an election. These circumstances, it would seem, are sufficient to put beyond question the fact of actual notice. It is true that, as compared with those received by the candidates for associate justice of the supreme court, the sum of the votes received by the candidates for the local judgeship was comparatively small. But when we call to mind that doubtless many refrained from voting because of the probable difference of opinion as to whether a judge was to be elected, and others because the candidates were not named in their party tickets, and were therefore overlooked, and still others because they were indifferent, the disparity in the number of votes cast is not alone sufficient to overturn the presumption arising upon the other admitted facts and circumstances enumerated above.

On the whole, we think the evidence discloses such an actual notice as to require us to adopt the conclusion that the election of the respondent must be upheld as valid, and that he is entitled to the office.

It is so adjudged.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

IN RE McDONALD.

(No. 3,626.)

(Submitted February 16, 1915. Decided February 27, 1915.)

[146 Pac. 942.]

*Habeas Corpus—Appeal—Kidnaping—Information—Sufficiency—Statutes—Rules of Interpretation.**Habeas Corpus—Appeal.*

1. Availability of the remedy by appeal is not a bar to relief by the writ of *habeas corpus* to one imprisoned for crime under an alleged void judgment.

[As to right of person in custody under judgment to be discharged on *habeas corpus*, when judgment ceases to be operative, see note in Ann. Cas. 1913B, 878.]

Criminal Law—Kidnaping—Information—Sufficiency.

2. Section 8306, Revised Codes, provides that every person who willfully seizes or inveigles another with intent to cause him to be *secretly* confined within the state, or sent out of the state, etc., is guilty of kidnaping. *Held*, that an information which omitted the qualifying word "secretly" in charging the crime of kidnaping was nevertheless sufficient to support a conviction.

Statutes—Rules of Interpretation.

3. In the interpretation of statutes, resort should first be had to the ordinary rules of grammar.

IN THE MATTER of the application of Michael McDonald for a writ of *habeas corpus*. Writ denied, and complainant remanded.

Messrs. Maury, Templeman & Davies and *Mr. I. G. Denny*, for Complainant, submitted a brief; *Mr. H. L. Maury* argued the cause orally.

Mr. D. M. Kelly, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, for the State, submitted a brief; *Mr. Wagner* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Habeas corpus. On August 29, 1914, an information was filed in the district court of Silver Bow county by the county attorney, charging the complainant and four others with the

crime of kidnaping. The charging part of the information is as follows: "That at the county of Silver Bow, state of Montana, on or about the 27th day of August, A. D. 1914, and before the filing of this information, the said defendants did willfully and unlawfully, wrongfully, intentionally and feloniously seize, confine and kidnap one Patrick Towey, a human being, with intent in them, the said defendants, then and there to cause the said Patrick Towey, without authority of law, to be kept and detained against his, the said Patrick Towey's, will."

Thereafter, the complainant having entered his plea of not guilty, such proceedings were had in the cause that it was transferred to Jefferson county, in the fifth district. On a trial a jury returned a verdict of guilty "of the crime of kidnaping in the manner and form charged in the information," leaving the punishment to be fixed by the court. The complainant was thereupon sentenced to a term of three years in the state prison at hard labor, where he was confined when this application was made. His counsel insist that his imprisonment is illegal for that the facts stated in the information do not constitute a public offense of the grade of felony, and hence that the court was without jurisdiction to sentence him to a term in the state prison, or, to make the statement specific, that the information does not charge the crime of kidnaping as defined by the statute, in that it omits the qualifying word "secretly." Of course, if this contention can be maintained, the court was without jurisdiction to pronounce the judgment it did, and hence execution of it upon the complainant is illegal. For though the court had jurisdiction of the crime of kidnaping and of the defendant and the authority to sentence him upon allegation and proof establishing his guilt, it was without authority to sentence him for that crime if the information charged, and the evidence demonstrated, that he was guilty of some other crime, as, for instance, false imprisonment.

The question whether in a given case the court pronounced the proper judgment may be inquired into by *habeas corpus*, [1] even though the complainant has a remedy by appeal. It

was expressly so ruled by this court in the case of *State v. District Court*, 35 Mont. 321, 89 Pac. 63. If the judgment or order upon which the complainant is imprisoned is for any reason void and open to collateral attack, relief may be had from the imprisonment, though the remedy by appeal is also available. (*In re Downey*, 31 Mont. 441, 78 Pac. 772; *In re Farrell*, 36 Mont. 254, 92 Pac. 785.)

The complainant was charged and convicted under section [2] 8306 of the Revised Codes. So far as it is pertinent here it reads as follows: "Every person who willfully (1) seizes, confines, inveigles or kidnaps another with intent to cause him, without authority of law, to be secretly confined or imprisoned within this state, or to be sent out of the state, or in any way held to service or kept or detained against his or her will or against the will of his or her parent or guardian, whether such guardian be natural or appointed * * * is guilty of kidnaping and is punishable by imprisonment in the state prison for not less than one year."

At the common law the offense of kidnaping consisted in the forcible abduction or stealing away of a person from his own country and sending him into another country. (Blackstone's Commentaries, p. 219; 1 Wharton's Criminal Law, 10th ed., sec. 590; Bishop's Criminal Law, 8th ed., sec. 750.) The crime has been much extended by statute, both in this country and in England, so that now it is defined and punished by statute, we believe, in all the states. These statutes in many cases include acts which formerly were punishable as false imprisonments only, or under other names and penalties, such as the abduction of children, etc. Eliminating the qualifying words "unlawfully," etc., which are not found in the statute, the Act charged as an offense by the information is that the defendant "did willfully seize, confine and kidnap one Patrick Towey * * * with intent * * * to cause * * * Patrick Towey, without authority of law, to be kept and detained against his will." It is said that the omission of the word "secretly," which qualifies every act enumerated as an offense, reduces the charge to one

of false imprisonment, which is defined and punished as a distinct offense under section 8324 of the Revised Codes. If we apply the ordinary rules of grammar to an analysis of this statute, which is always the first resort in the process of interpretation (*Jay v. School Dist. No. 1*, 24 Mont. 219, 61 Pac. 250; Endlich on Interpretation of Statutes, sec. 4), we find that it includes these acts as offenses: To seize, *etc.*, another with intent to cause him, without authority of law: (1) To be secretly confined or imprisoned within this state; (2) to be sent out of the state; or (3) to be in any way held to service or kept or detained against his will, or, in case the person is a minor or under guardianship, against the will of the parent or guardian. That the word "secretly" does not modify the words "kept or detained" is entirely clear when we note that the clause "to be secretly confined or imprisoned within this state" is made co-ordinate with each of the following by the use of the disjunctive "or," and that all of them are complete within themselves, without the interpolation of any word whatsoever. If the word "secretly" is to be understood as modifying this clause, for the same reason it must also be understood as modifying the clause "to be sent out of the state," whereas the element of secrecy has never been regarded as a concomitant of the act denounced as an offense by this clause, when the act is accompanied by unlawful violence and the necessary intent; for no intelligent person, upon reading the statute, could escape the conclusion that if one person should seize another without authority of law with the intent to cause him to be sent out of the state, that act would come within the provision of the statute, whether it should be done secretly or openly.

The crime of kidnaping is closely analogous to the crime of false imprisonment. The latter is any unlawful violation of the personal liberty of another, both at common law and under the statute. (Rev. Codes, sec. 8324; McClain on Criminal Law, sec. 486; Bishop's Criminal Law, 8th ed., 748.) The former is an aggravated form of the latter. At common law the element of aggravation was the removal of the person from his country

or state, not the secret removal. Under the statute, the intent to remove is sufficient to complete the offense. Thus an act which, in the absence of the statute, was only a false imprisonment, is brought into the category of acts punished as the aggravated offense. It was within the power of the legislature to do this. It might, if it chose, define and punish all false imprisonments as kidnaping. Whether it has in fact done this, thus rendering section 8324 measurably useless, it is not necessary for us to inquire at this time. Our task is at an end when, applying the elementary rule of construction to the statute, it is ascertained that the act charged in the information is within the purview of the definition there laid down. Objections to the propriety of legislation destroying the distinction between this crime and that of false imprisonment, if such is the result, should be addressed to the legislature. This court is not required, by resort to artificial rules of interpretation, to import into a statute a meaning which its words clearly do not convey.

Counsel insist that our statute is a copy of that found in the Penal Code of the state of New York, and that this court is bound by the construction given by the court of last resort of that state. They cite and rely with confidence upon the case of *People v. Camp*, 139 N. Y. 87, 34 N. E. 755, as conclusive of their contention. That the statute was adopted from the Code of New York, directly or indirectly, we do not question. That the interpretation given it by the highest court of that state should be accorded most respectful consideration we readily concede. That we are bound by it we do not concede. The question decided by the court in *People v. Camp* was whether, in order to sustain a conviction under the statute, it must appear that the imprisonment or confinement, besides being against the will of the person detained and without authority of law, must also be done secretly. The court reached the conclusion that it must so appear. The clause of the statute in question here, however, was not considered. Some remarks of the court found in the opinion seem to lend support to the contention of counsel, but do not in fact when we keep in view the question exam-

ined and decided. The case is not in point. Neither is the case of *Smith v. State*, 63 Wis. 453, 23 N. W. 879, also cited by counsel. An examination of the statute of Wisconsin discloses that the definition of the crime by it is so essentially different from that given in our statute that decisions interpreting it furnish little, if any, aid in the interpretation of ours. In only one case has our own court ever had occasion to consider any provision of the statute. In *State v. Stickney*, 29 Mont. 523, 75 Pac. 201, was brought in question the sufficiency of an information charging the species of crime defined by subdivision 3 of section 380 of the Penal Code of 1895, which was identical with subdivision 3 of the present statute (Rev. Codes, sec. 8306.) In disposing of this contention the court said that if the prosecution had been brought under subdivision 1, the objection made would be maintainable, but that under subdivision 3, if the defendant had willfully and feloniously enticed or taken the prosecuting witness from the state of Colorado, he could have completed the crime of kidnaping as defined in that subdivision, by sending, bringing, having or keeping her, or causing her to be kept or secreted in this state. What was thus said by way of argument was without any purpose of determining that secrecy is an essential element of every act denounced in subdivision 1. Even so, now that subdivision 1 is the subject of interpretation, the remark relied on by counsel cannot be given the import they assign to it. It can have application only to the first disjunctive clause of subdivision 1.

The charge in the information in this case was sufficient under the third clause of this subdivision, and the judgment pronounced against complainant was correct. The writ is discharged, and the complainant is remanded to the custody of the warden of the state prison.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

IN RE BRADLEY ET AL.

(Nos. 3,627, 3,628, 3,629.)

(Submitted February 16, 1915. Decided February 27, 1915.)

[146 Pac. 944.]

Habeas Corpus—Kidnaping—Information— Sufficiency.[For syllabus, see *In re McDonald*, ante, p. 348.]

IN THE MATTER of the applications of Joseph Bradley, Owen Smith and William Winchester, for writs of *habeas corpus*. Writs denied, and complainants remanded.

Mr. I. G. Denny and *Messrs. Maury, Templeman & Davies*, for Complainants.

Mr. D. M. Kelly, Attorney General, and *Mr. C. S. Wagner*, Assistant Attorney General, for the State.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Habeas corpus. In these cases the question presented is identical with that presented in the case of *In re McDonald*, ante, p. 348, 146 Pac. 942. Upon the authority of that case the several writs are discharged, and the complainants are remanded to the custody of the warden of the state prison.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

MISSOULA TRUST & SAVINGS BANK, RESPONDENT, v.
IMAN & SON ET AL., APPELLANTS.

(No. 3,470.)

(Submitted February 9, 1915. Decided February 27, 1915.)

[146 Pac. 941.]

Interpleader—Equity—Jury Trial.

1. A suit in interpleader is equitable in its nature, in which neither party is entitled to a jury trial as a matter of right; hence where a jury had been called, but disagreed, the court was within the rightful exercise of its authority in discharging them and deciding the controversy itself.

[As to the right of interpleader, see note in 91 Am. St. Rep. 593.]

Appeal from District Court, Missoula County; R. Lee McCullough, Judge.

INTERPLEADER by the Missoula Trust & Savings Bank against Thomas J. Murphy, Constable of Hellgate Township, Commercial National Bank, Iman & Son and others. Judgment for defendant Commercial National Bank, and defendants Iman & Son and others appeal. Affirmed.

Cause submitted on briefs of counsel.

Mr. Elmer E. Hershey, for Respondent.

Mr. E. C. Mulroney and Mr. Richard H. Smith, for Appellants.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1910 the Commercial National Bank, a corporation, recovered judgment in a justice of the peace court against J. S. Iman for something over \$200. Execution was issued and placed in the hands of Constable Thos. J. Murphy, who levied upon \$156.49, then on deposit with the Missoula Trust & Savings Bank, in the name of Iman & Son. Wilhelmina Iman and Russel O. Iman laid claim to the exclusive ownership of the deposit,

and to relieve itself the Missoula Trust & Savings Bank brought this action setting forth the facts, deposited the funds with the clerk of the court, and asked for an adjudication of the ownership as between the conflicting claimants. Issues having been framed, the cause was tried to the court sitting with a jury. The jury failed to agree upon a verdict or findings and were discharged, whereupon the Commercial National Bank moved the court for a judgment in its favor, and this motion was granted, and judgment entered accordingly. The defendants Iman & Son, Wilhelmina Iman and Russel O. Iman have appealed.

The contention of appellants is that the action is one at law, [1] and therefore the court was without authority to withdraw the case and determine the issue of fact without the aid of a jury. The question is not a debatable one in this jurisdiction. It has been adjudicated by this court in harmony with the very decided weight of authority. Section 6495, Revised Codes, provides for two classes of cases—substitution and interpleader. (1) If A sues B respecting a fund which C also claims, B may have C substituted as defendant and himself relieved from liability. When the order of substitution is made, the action proceeds according to the course of common-law practice. (2) If A and C assert hostile claims to a fund in the hands of B but neither commences an action, B, to relieve himself from liability, may commence a suit in interpleader naming A and C as defendants, deposit the fund in court, and be discharged. Because B has no interest in the fund, and because neither A nor C has infringed his rights, he cannot state a cause of action at law against either or both, but may invoke the aid of equity. The meaning of the section above is so obvious that a construction of it ought not to be necessary; however, in *Anderson v. Red Metal Min. Co.*, 36 Mont. 312, 93 Pac. 44, we considered this same provision at length, gave a brief history of its origin and purpose, and made a similar analysis. The decision in that case is conclusive of this.

The Missoula Trust & Savings Bank had no interest whatever in the fund on deposit with it. It was a mere stakeholder. As between the conflicting claimants to the fund, the bank was unwilling to assume the risk of incurring liability by deciding the question of ownership for itself, and accordingly sought relief under the statute above. It could not allege that any one or more of the claimants had infringed any of its rights, and therefore it could not state a cause of action at law. It could, however, invoke the aid of a court of equity under section 6495 above, and in such a suit neither party was entitled to a jury trial, as a matter of right. The trial court might call to its aid a jury to advise upon disputed questions of fact, but even as to such questions the court would not be bound by the jury's findings but might disregard them and make findings of its own. This has been the uniform practice in this state, from *Gallagher v. Basey*, 1 Mont. 457, to the latest pronouncement upon the subject in *O'Malley v. O'Malley*, 46 Mont. 549, Ann. Cas. 1914B, 662, 129 Pac. 501.

The trial court was clearly within the rightful exercise of its authority in discharging the jury and deciding the controversy, and its judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

TAINTOR, APPELLANT, v. ST. JOHN, RESPONDENT.

(Nos. 3,473 and 3,474.)

(Submitted February 9, 1915. Decided February 27, 1915.)

[146 Pac. 939.]

Receivers—Vacating and Abrogating Appointment—Effect of Orders—Estoppel—Failure to Appeal—District Court—Powers—Partnership—Costs and Expenses—Erroneous Judgment—Nonappealable Orders.

Appeal and Error—Receivers—Nonappealable Orders.

1. An order annulling an order appointing a receiver is not appealable, but may be reviewed on appeal from the final judgment.

[As to what judgments and errors may be appealed from, see note in 20 Am. St. Rep. 714.]

Receivers—Appointment—Vacating and Abrogating Order—Effect.

2. An order vacating an order appointing a receiver, in effect discharges the receiver and relieves him and the party at whose instance he was appointed from liability on account of the receivership, but an order abrogating such an order blots out the receivership as from the beginning, and leaves the party who procured the appointment liable for the expense incurred by reason of the receivership, over what it would have been if a receiver had not been appointed.

Same—Validity of Appointment—Failure to Appeal—Estoppel.

3. Neither failure to appeal from an order appointing a receiver, nor subsequent orders of the judge directing the receiver in the management and disposition of the property in his charge, were conclusive as to the propriety of the appointment so as to prevent a subsequent order annulling it.

Same—Orders—District Judges—Powers.

4. An order annulling an order appointing a receiver could properly be made by the successor in office of the judge who made the appointment.

Same—Appointment—Partnership—Annulment of Order—Costs and Expenses—Erroneous Judgment.

5. Where an order appointing a receiver of a partnership composed of two, at the suit of one of them was annulled after all costs and expenses of the receivership had been paid out of the receivership funds, the court committed error in adjudging that defendant recover from plaintiff the full amount of such costs and expenses; inasmuch as the receivership funds were owned by plaintiff and defendant in equal proportions, judgment for one-half of the expenses was all defendant was entitled to.

Appeal from District Court, Rosebud County; Geo. W. Pierson, Judge.

ACTION by C. M. Taintor against C. C. St. John. From a judgment for plaintiff and from orders annulling an order ap-

pointing a receiver and denying a new trial, plaintiff appeals. Appeal from order annulling the appointment of the receiver dismissed. Order denying new trial affirmed. Judgment ordered modified and affirmed as modified.

Messrs. Gunn, Rasch & Hall, Mr. D. B. P. Marshall, Mr. Geo. W. Farr and Mr. O. F. Goddard, for Appellant, submitted a brief; *Mr. M. S. Gunn* argued the cause orally.

The court erred in vacating and annulling the order appointing a receiver. As the order appointing a receiver was an appealable order (sec. 7098, Rev. Codes), and no appeal was taken therefrom, the lower court was without jurisdiction to vacate and annul the same. (Sec. 7096, Rev. Codes, *Whitbeck v. Montana Cent. Ry. Co.*, 21 Mont. 102, 52 Pac. 1098; *Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920.) The lower court undoubtedly had the right, upon a showing that there was no further necessity for a receiver, to vacate the order appointing him or order his discharge. Under such circumstances, the vacation of the order appointing a receiver is the same as an order of discharge. (*Forrester & MacGinniss v. Boston & Mont. etc. Min. Co.*, 24 Mont. 148, 60 Pac. 1088, 61 Pac. 309; *Pagett v. Brooks*, 140 Ala. 257, 37 South. 263.)

The order complained of not only discharged the receiver, but "vacated and annulled" the order appointing him, for the reason stated that such order "was improvidently and improperly made." We do not question the order to the extent that it discharged the receiver, but we respectfully submit that the part of the order annulling the order appointing the receiver was made without jurisdiction, and is void. The discharge of the receiver or the vacation of the order appointing him, where the purpose is to effect a discharge, is very different from both vacating and annulling the order appointing a receiver. Where the order vacating the appointment operates merely as the discharge of a receiver, both the receiver and the party who secured his appointment are relieved from liability for the acts of the receiver, whereas, if the order is vacated in the sense of

being annulled, the receiver and the party securing his appointment will be regarded as wrongdoers. (*Thornton-Thomas Co. v. Bretherton*, 32 Mont. 80, 80 Pac. 10; *Forrester & MacGinnis v. Boston & M. etc. Min. Co.*, *supra*.)

Assuming, however, for the sake of argument, that the lower court had jurisdiction, not only to discharge the receiver but to annul the order appointing him, we submit the finding of the court that the order was improvidently and improperly made was wholly unwarranted. It is fundamental law that where there is jurisdiction of the parties and subject matter, the appointment of a receiver is within the discretion of the court or judge, and that the appointment will not be annulled by an appellate court unless there has been a clear abuse of discretion. (High on Receivers, 4th ed., p. 12; Beach on Receivers, sec. 118; *Whitley v. Bradley*, 13 Cal. App. 720, 110 Pac. 596; *Heinze v. Butte & B. M. Co.*, 126 Fed. 1, 61 C. C. A. 63.) It follows that Judge Pierson, even conceding that he was authorized to review the action of Judge Fox in making the appointment, should not have annulled the order unless the latter had been guilty of a clear abuse of discretion.

The orders of October 11 and November 21, 1912, continuing the receivership were in effect a reappointment of the receiver. (*Southwell v. Church*, 51 Tex. Civ. App. 547, 111 S. W. 969.) The same reason existed for the appointment as justified the continuation of the receivership, or what was in effect the reappointment and the orders continuing the receivership are in direct conflict with the order subsequently made annulling the appointment. In view of the fact that the receiver was continued in office and was required and commanded to gather and ship the balance of the cattle upon the application of the defendant, there was clearly an estoppel on the part of the defendant to afterward move to have the order appointing the receiver annulled. (34 Cyc. 162, and cases cited; *McKinnon v. Wolfenden*, 78 Wis. 237, 47 N. W. 436; *Dilley v. Jasper Lumber Co.* (Tex. Civ. App.), 114 S. W. 878.)

Where an order appointing a receiver is reversed, or it is otherwise determined that a receiver was appointed without cause, the party securing the appointment is liable for the salary and expenses of the receiver in excess of any benefit to the other party. (*Hickey v. Parrot Silver etc. Co.*, 32 Mont. 143, 108 Am. St. Rep. 510, 79 Pac. 698.) Where, however, there was just cause for the appointment of a receiver, the salary and other expenses of the receiver are a charge against the property. (High on Receivers, 4th ed., sec. 809; *Ferguson v. Dent*, 46 Fed. 88; *Clark v. Brown*, 119 Fed. 130; *Hembree v. Dawson*, 18 Or. 474, 23 Pac. 264.)

Messrs. Enterline & Lefleche and *Messrs. Loud, Collins, Campbell, Wood & Leavitt*, for Respondent, submitted a brief; *Mr. Chas. S. Loud* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

After C. M. Taintor and C. C. St. John had been jointly interested in certain range livestock and equipment for carrying on the business for a time, this suit was instituted by Taintor against St. John to terminate the relationship, for an accounting, and for the appointment of a receiver. On January 23, 1912, after a hearing at which both parties were present in person and by counsel, a receiver was appointed. On June 28 following the cause was committed to a referee to take testimony and report findings. Before the conclusion of the hearing the parties effected a compromise of their differences, and entered into an agreement of settlement, by the terms of which, after the payment of certain stated amounts, the residue of all net proceeds arising from the sale of steer cattle should be divided between the parties equally. All questions affecting the receivership were left for determination by the court. On October 11 the court entered an order, and on November 25 a supplemental order, directing the receiver with reference to the disposition of the property. In October, 1912, February, 1913,

and March, 1913, the receiver made his reports to the court, and these reports were approved. On March 4, 1913, the defendant moved the court to vacate and dissolve the order appointing the receiver, and this motion was sustained in an order which reads as follows: "Whereas it appears that there is no further need for the continuance of the receiver in this cause, John T. Logan, heretofore appointed receiver in this cause, is hereby discharged, and his bond exonerated from further liability, and, whereas, it further appearing to the satisfaction of the court that no cause existed for the making of the original order appointing said receiver in this cause, and that such order was improvidently and improperly made, that the original order appointing John T. Logan as such receiver be, and the same is hereby, vacated and annulled." In September, 1912, the referee made his report, and on September 25, 1913, the court rendered its final judgment that plaintiff take nothing, and that defendant recover from plaintiff the sum of \$5,675.42, which was determined to be the amount of the expenses of the receivership over what would have been incurred in transacting the business if a receiver had not been appointed. From that judgment and from an order denying him a new trial, plaintiff has appealed.

The Constitution provides for appeals to the supreme court from the district courts under such regulations as may be prescribed by law. (Art. VIII, sec. 15.) Section 7098, Revised [1] Codes, enumerates the judgments and orders from which appeals are allowed. "An appeal is authorized by statute only, and, unless the judgment or order which it is sought to have reviewed in this mode falls fairly within the enumeration of appealable orders or judgments made by the statute, the appeal does not lie." (*Tuohy's Estate*, 23 Mont. 305, 58 Pac. 722; *State ex rel. Jackson v. Kennie*, 24 Mont. 45, 60 Pac. 589.) Since an order annulling an order appointing a receiver is not one of the judgments or orders enumerated in section 7098, above, no appeal lies therefrom, though such order is reviewable upon appeal from the final judgment.

Counsel for appellant concede that the trial court had authority to vacate the order appointing the receiver, but deny to the court the right or authority to abrogate the order altogether. [2] An order vacating an order appointing a receiver is, in effect, an order discharging the receiver, and such an order relieves the receiver, and the party at whose instance he was appointed, from liability on account of the receivership (*Forrester & MacGinniss v. Boston & Mont. etc. Co.*, 24 Mont. 148, 60 Pac. 1088, 61 Pac. 309); whereas the effect of an order abrogating an order appointing a receiver is to blot out the receivership as from the beginning, and leave the party who procured the appointment liable for the expense incurred by reason of the receivership over what it would have been if a receiver had not been appointed. (*Thornton-Thomas Merc. Co. v. Bretherton*, 32 Mont. 80, 80 Pac. 10.)

The principal contention of counsel for appellant has its foundation in the hypotheses: (a) That the original order [3] appointing the receiver was appealable under section 7098, above, and, since no appeal was taken, the matter should be deemed adjudicated upon the facts as they existed at the time the order was made; (b) that the subsequent orders directing the receiver in the management and disposition of the property operated as reappointments of the receiver, or, at least, as confirmations of the original order; and (c) that, since the order appointing the receiver was made by Judge Fox, Judge Pierson was without authority to review and annul such order. Appellant relies upon the decision of this court in the *Forrester & MacGinniss Case*, above, while counsel for respondent cite the former appeal in the same action (22 Mont. 430, 56 Pac. 868). Neither case is directly in point. The opinions, while somewhat illuminating, are not decisive upon the facts as presented in this instance; but the later case of *Lyon v. United Fidelity & Guaranty Co.*, 48 Mont. 591, 140 Pac. 86, determines the questions raised upon the first and second hypotheses above adversely to appellant's contention. We are satisfied with the conclusions

announced in that case, and further discussion would be without avail.

(c) The order appointing the receiver was made by Judge Fox sitting in the court of the thirteenth judicial district. The [4] order of annulment was made by Judge Pierson in the same court after the expiration of Judge Fox's term. While it is true in a certain sense that to make the order of annulment Judge Pierson necessarily reviewed the order appointing the receiver, he did nothing which Judge Fox during his term might not have done under the decision in the *Lyon Case*, above. It was the same court which acted in each instance, and, in our opinion, it is immaterial that a different judge presided upon the different occasions.

In determining the amount of the judgment, the trial court [5] fell into error. The reports of the receiver disclose that all costs and expenses of the receivership had been paid out of the receivership funds, which funds belonged to the plaintiff and the defendant in equal proportions. It thus appears that plaintiff had already contributed one-half toward the expenses found to be unnecessary by reason of the receivership. To impose upon him now the additional burden of paying the respondent such expenses in full, after he has paid one-half, is inequitable, and cannot be defended. If he is required to pay an additional one-half of such unnecessary expenses, he will then have been penalized for his wrongful act to the full extent authorized by law. The costs of suit were properly taxed against the plaintiff, for the court found against him on the merits of the case.

The attempted appeal from the order annulling the order appointing the receiver is dismissed. The order refusing a new trial is affirmed. The cause is remanded to the district court, with directions to modify the judgment by reducing the amount thereof one-half as of the date of its original entry, and, when so modified, the judgment will stand affirmed. Each party will pay one-half of the costs of these appeals.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

IN RE BAILEY.

(No. 3,620.)

(Submitted February 16, 1915. Decided March 1, 1915.)

[146 Pac. 1101.]

*Attorney and Client—Practicing Law Without License—Contempt.**Attorney and Client—Practicing Law—What Constitutes.*

1. A person who makes it his business to act, and who does act, for, and by the warrant of, others in legal formalities, negotiations or proceedings, practices law.

[As to presumption in favor of authority of attorney, see note in 16 Am. Dec. 98.]

Same—Practicing in Court of Record—What Constitutes.

2. One who advises clients touching legal matters pending or to be brought before a court of record, or prepares pleadings or proceedings for use in a court of record, or appears before a court of record, either directly or by a partner or proxy, practices law in a court of record.

Same—Practicing Without License—Contempt.

3. One who does the things referred to in paragraphs 1 and 2, *supra*, without having been duly licensed by the supreme court to act as an attorney and counselor at law, is guilty of a contempt of said court.

Same—Practicing Law—Not Inherent Right.

4. The practice of law is not an inherent right, but a privilege, subject to state control.

[As to validity of tax on occupation of attorney, see note in Ann. Cas. 1912A, 599.]

PROCEEDINGS in contempt against Wendell Bailey for practicing law within the state without a license. Respondent adjudged guilty.

Cause submitted on briefs of counsel.

Mr. C. B. Nolan, for Respondent.

Mr. D. M. Kelly, Attorney General, *Mr. J. H. Alvord*, Assistant Attorney General, and *Mr. F. P. Leiper*, for the State.

MR. JUSTICE SANNER delivered the opinion of the court.

On January 19, 1915, the attorney general of this state filed in this court an accusation charging one Wendell Bailey, of Sidney, Richland county, Montana. with a contempt of this

court, in that said Bailey "is holding himself out as an attorney at law, by advertisement and otherwise, and is practicing the profession of an attorney and counselor at law in courts of record in the said town and county, without having first been admitted so to do by this court." Upon this accusation, which was supported in detail by the affidavit of F. J. Matoushek, Herbert H. Hoar and Carl L. Brattin, all regularly licensed attorneys residing at Sidney, a citation was issued requiring the respondent to appear and show cause why he should not be punished. He appeared and entered his plea of not guilty and filed a detailed answer consisting of denials, admissions and matters in avoidance. A hearing was duly had before this court, testimony being taken both in support of and against said accusation, and thereafter the matter was duly submitted for judgment and decision.

No good purpose would be served by reciting the evidence at length. Suffice it to say, the following facts were made to appear without substantial contradiction: The respondent has never been admitted to practice law in this state; but on February 16, 1914, he opened a law office at Sidney, from which time and until June 1, 1914, he maintained and conducted said office in his individual name, displayed at the entrance thereof a sign reading, "Wendell Bailey, Attorney at Law," caused a card to be published in the telephone directory commonly used at Sidney, and in four newspapers of general circulation in Richland county, to the effect that he was an "attorney and counselor at law," procured and used stationery proclaiming him to be an "attorney and counselor at law," received, advised and acted for clients in legal matters pending in court and otherwise, represented them in proceedings cognizable only by the courts of record of this state, and charged and accepted compensation for such services; that on or about June 1, 1914, he associated himself in partnership with one R. O. Lunke, a licensed attorney of this court, said partnership being formed for the general practice of law, including practice in the courts of record of this state, particularly the district courts of Richland and Dawson counties; that said partnership continued in existence up

to the time of the hearing herein, proclaimed itself by signs, cards, stationery and indorsements upon pleadings as a firm of attorneys at law, prepared, signed and filed pleadings as such in the district court of Richland county, received, advised and acted for clients in legal matters pending in court and otherwise, appeared for clients in proceedings before said court, and charged and accepted compensation for services in that behalf; that the respondent actively participated in the business and operations of said firm, and prior to October 28, 1914, appeared in person before the district court of Richland county as a member of said firm, claiming to represent and representing parties to actions or proceedings before said court; that after October 28, 1914, and up to the time of the hearing herein, he prepared, signed and filed pleadings in said court for and on behalf of said firm and as a member thereof, formulated briefs, advised clients touching legal matters, consulted with his associate concerning the business intrusted by clients to said firm, and claimed a share in the revenues derived from its professional activities.

It is not contested that the foregoing acts, if they constitute contempt at all, are a contempt of this court. Indeed, this could scarcely be questioned, in view of the provisions of Title V, Part I, Code of Civil Procedure, whereby the authority to admit attorneys to the practice is vested solely in this court. The contention is that these acts do not constitute contempt at all under any statutory provision of this state.

The Revised Codes (section 6388) provide: "If any person practice law in any court, except a justice's court or a police court, without having received a license as attorney and counselor, he is guilty of a contempt of court." The distinguished counsel for respondent seeks the exoneration of his client upon the ground that the record does not show that respondent practiced law in any court other than a justice or police court. We cannot assent to this. A person who makes it his business to act and [1] who does act for and by the warrant of others in legal formalities, negotiations or proceedings, practices law (*Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *In re Duncan*, 83

S. C. 186, 18 Ann. Cas. 657, 24 L. R. A. (n. s.) 750, 65 S. E. 210; and when his acts consist in advising clients touching legal [2] matters pending or to be brought before a court of record, or in preparing pleadings or proceedings for use in a court of record, or in appearing before a court of record, either directly or by a partner or proxy, he is practicing law in a court of record. (*Bank v. Risley*, 6 Hill (N. Y.), 375; *Abercrombie v. Jordan*, 8 Q. B. D. 187; *In re Simmons*, 15 Q. B. D. 348.) The respondent seems to think that, so far as his activities prior to October 28, 1914, are concerned, a plenary absolution was granted him at that time by two of the members of this court—one of them being the writer—on condition that he refrain thereafter from practicing in the district court. No such thing occurred; but, had it occurred, the condition assumed was not observed. After October 28, 1914, the respondent continued as a member of the firm of Lunke & Bailey to do all the things which constitute practice in the district court, save only the personal conduct of causes therein, which was confided to Mr. Lunke.

But section 6388 is not the only statutory provision applicable to the conduct of the respondent. Subdivision 6 of section 7309 provides: "The following acts or omissions, in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: * * * Assuming to be an officer, attorney or counsel of a court, and acting as such without authority." From February 16 to June 1, 1914, the respondent [3] employed all the customary methods to advertise himself as an attorney and counselor at law, capable and authorized to do any business in any court which a duly licensed attorney might do; and from June 1, 1914, up to the time of the hearing herein, he and his associate, as the firm of Lunke & Bailey, presented themselves to the public in a similar manner and aspect. As to this there was no ostensible change after October 28, 1914. The only attorneys and counselors known to the law of this state are attorneys and counselors of this court, licensed and authorized as such to practice law within this state; and, if by his conduct the respondent did not assume to be an

attorney and counselor of this court, then such an assumption is impossible, and subdivision 6 of section 7309 has no meaning at all. (*State v. Richardson*, 125 La. 645, 51 South. 673; *People v. Erbaugh*, 42 Colo. 480, 94 Pac. 349; *Edmondson v. Davis*, 4 Esp. 14; *Abercrombie v. Jordan*, *supra*.)

When we consider the relationship of attorney and client and its consequences to the client, as well as to his possible adversary, it becomes manifest that insistence upon due authorization of the persons acting as attorneys is of vital importance. People do not ordinarily demand an inspection of the license of one who proclaims himself an attorney at law; they take it for granted, as they may do, that he is what he assumes to be. The law says who may and who may not practice as an attorney, who may and who may not assume to be such. The people have a right to presume that the law in this respect is being enforced; if it is not enforced, such persons as intrust their business to an unchallenged pretender are permitted, in matters of life, of [4] liberty and of property, to lean upon a broken reed. For this reason it is universally held that the practice of law is not an inherent right but a privilege, subject entirely to state control.

From the evidence presented we find that the respondent, Wendell Bailey, is guilty of contempt, as charged in the accusation of the attorney general; and it is ordered and adjudged that for such contempt he pay a fine of \$250, or stand committed to the custody of the sheriff of Lewis and Clark county, Montana, until the same be paid.

MR. JUSTICE HOLLOWAY CONCURS.

MR. CHIEF JUSTICE BRANTLY: I was not present at the hearing, and therefore did not observe the witnesses who testified thereat. But having informed myself by an examination of the stenographic report made at the time, and having found that there is no substantial conflict in the evidence, I feel that I may with propriety concur in the result reached by Mr. Justice SANNER.

CASES DETERMINED
IN THE
SUPREME COURT

AT THE
MARCH TERM, 1915.

THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. WILLIAM L. HOLLOWAY, }
THE HON. SYDNEY SANNER, } **Associate Justices.**

DOORNBOS, RESPONDENT, v. THOMAS ET AL., APPELLANTS.

(No. 3,480.)

(Submitted February 10, 1915. Decided March 4, 1915.)

[147 Pac. 277.]

*Sales—Warranty—Breach—Election of Remedies—New Trial—
Notice — Sufficiency — Record on Appeal — Technicalities —
Pleading and Practice—Reply—Departure—Effect.*

New Trial—Notice of Motion—Sufficiency.

1. Though movant for a new trial may not, in the notice to his adversary, state that he will pursue one of the methods authorized by section 6796, Revised Codes, and thereafter change to another, nor state two or more methods in the alternative, he may state them all conjunctively and thereafter abandon all but one, without laying his notice open to the charge of insufficiency.

[As to what proceedings are inconsistent with motion for new trial so as to waive right to move, see note in Ann. Cas. 1914B, 612.]

Same—Record on Appeal—Technicalities.

2. The inadvertent use of the term "bill of exceptions" for "statement of the case" by the trial court and counsel for appellant in designating the record was not sufficient reason to deny a hearing on the merits and dismiss the appeal.

(370)

Appeal and Error—Record—Judgment-roll—Authentication—Sufficiency.

3. Where the record on appeal contains properly authenticated copies of the papers of which the judgment-roll is composed, it is sufficient to meet the requirements of section 6799, Revised Codes, even though it is not authenticated by the clerk as the judgment-roll.

[As to effect on bill of exceptions of neglect of judge to sign same within time allowed by law, see note in Ann. Cas. 1913A, 914.]

Pleading and Practice—Reply—Departure.

4. The reply cannot be looked to to aid the cause of action alleged in the complaint; hence, where plaintiff in his complaint relied for recovery on a breach of warranty and in his reply upon a subsequent undertaking of defendant with reference to the article sold, there was such a departure in pleading as to defeat recovery on the cause thus alleged.

Sales—Breach of Warranty—Remedies.

5. A buyer of an article under a guaranty as to its fitness for the purpose for which it is bought may, upon discovery of defects after a fair trial, if the facts warrant it, either (1) rescind the contract and sue for recovery of the price; (2) retain the article and bring action for damages for breach of warranty; or (3) sue for the fraud practiced upon him.

Same—Election of Remedies.

6. A purchaser of a piece of farming machinery under an alleged warranty who elected to rescind the contract of purchase, receiving back the consideration paid for it, was bound by his election, and could not thereafter sue for a breach of the warranty.

Appeal from District Court, Gallatin County; B. B. Law, Judge.

ACTION by A. Doornbos against W. L. Thomas and others. Judgment for plaintiff, and defendants appeal from it and an order denying a new trial. Reversed and remanded.

Mr. Walter Aitken, for Appellants, submitted a brief and argued the cause orally.

According to the allegations of the complaint, there were an even 100 acres sown with this alleged defective drill, and they yielded an average of 19.32 bushels to the acre. It will further be noted from the evidence of plaintiff himself that all of this 100 acres, except fifteen or eighteen acres, were sown with the drill after he knew it was defective and before any steps whatever had been taken to remedy the alleged defects. This brings the case within the rule laid down in Cyc., that there can be no recovery of enhanced damages caused or contributed to

* * * by persisting in the use of an article after knowledge

of the defects. (35 Cyc. 465, 472; *Weybrich & Co. v. Harris*, 31 Kan. 92, 1 Pac. 271; *Wright v. Computing Scale Co.*, 47 Wash. 107, 91 Pac. 571; *Guetzkow Bros. Co. v. Andrews*, 92 Wis. 214, 53 Am. St. Rep. 909, 52 L. R. A. 209, 66 N. W. 119; *Corbin v. Thompson* (Canada), 2 B. R. C. 70; *Wiggins v. Jackson*, 31 Okl. 292, 43 L. R. A. (n. s.) 153, 121 Pac. 662.) A case almost identical with the case at bar is *Gale Sulky Harrow Mfg. Co. v. Moore*, 46 Kan. 324, 26 Pac. 703.

The rule as to the time to which a general warranty relates is laid down thus: "Unless otherwise expressed, a warranty relates only to the time of sale and does not cover defects not then in existence. * * * That is to say, a breach of warranty can be predicated only on a loss caused by a defect which existed at the time of the sale." (35 Cyc. 414, 415.)

Plaintiff must either affirm the contract and sue for damages, or he can disaffirm the contract and sue for a return of the consideration. (*Madison River Livestock Co. v. Osler*, 39 Mont. 244, 133 Am. St. Rep. 558, 102 Pac. 325.) In conformity to the rules of law as laid down by this court in the above cited case, it must also be held that when the vendee (respondent herein) elected to return the drill and take back his note, he elected to treat the contract as abrogated, and could not thereafter maintain any action on said contract, whether for breach of warranty or otherwise. (*Luitweiler Pumping E. Co. v. Ukiah W. & Imp. Co.*, 16 Cal. App. 198, 116 Pac. 707, 712; *Cookingham v. Dusa*, 41 Kan. 229, 21 Pac. 95; *Holt Mfg. Co. v. Strachan*, 77 Wash. 380, 137 Pac. 1006; *McCormick Harvesting Machine Co. v. Brown*, 5 Neb. Unof. 356, 98 N. W. 697; *Punteney Mitchell Mfg. Co. v. T. G. Northwall & Co.*, 66 Neb. 5, 91 N. W. 863; *Westinghouse Co. v. Meixel*, 72 Neb. 623, 101 N. W. 238.)

Mr. John A. Luce, for Respondent, submitted a brief and argued the cause orally.

Manifestly, the use of the drill after the defects were discovered by Doornbos, by him, were at all times at the express instance and request of the appellants, and upon their express

assurance that it would be all right and their guaranty that he would get a good crop. Under these circumstances, appellants cannot now be heard to claim that by the use after the discovery that the drill was not working well, Doornbos was violating some right of the defendants, but they are estopped to claim that by the use of this article Doornbos in any way contributed to the damage or waived his warranty. The rule in relation to this proposition is clearly stated in 35 Cyc. 433: "Where the retention and use has been induced by the request or promise of the seller, there is no waiver of the warranty." (*Osborne v. McQueen*, 67 Wis. 392, 29 N. W. 636; *Kenney v. Bevilheimer*, 158 Ind. 653, 64 N. E. 215; 30 Am. & Eng. Ency. of Law, 2d ed., 188.) It has likewise been held that the waiver of defects does not result from a single instance of use after notice to the seller to remove the goods, or from use for the purpose of testing the article, or while efforts are being made to remedy defects. (35 Cyc. 242.)

No rescission was effected by consent or by agreement, and neither of the parties followed the provisions of section 5065, regarding the rescission of contracts. As to the contention of appellants that the action cannot be maintained for damages under the circumstances, I submit that the appellants by returning the note given by the respondent to them could not relieve themselves of the damages which had accrued by reason of the use of this drill at the request of the defendants. It is true that counsel has cited several cases which hold that the general rule is that where a machine sold is defective, the purchaser may return the machine and may recover the purchase price, or he may elect to keep the machine, pay the price and sue for damages "in the difference of the value of the machine as represented and warranted and as it really was." Many of these cases, however, overlook the exception to this general rule that where, under special circumstances, damages in addition to the difference between the value of the article as warranted and as sold has accrued, these special damages may be recovered either on a return of the property or its retention.

The rule in such cases as this is laid down in 35 Cyc. 444 as follows: "Where the breach of warranty is of such a nature as to justify a return, the buyer cannot be compelled to elect between a return and damages, as he may be entitled to both."

In *Kimball & Austin Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558, may be found a clear and explicit statement of the rule as contended for by respondent. It completely disposes of the *dicta* of cases not carefully considered holding the return of the goods a rescission of the contract. The argument in the above case is unanswerable, and should be decisive of the case at bar.

The retention of the drill by Doornbos after knowledge of its defects having been because of the refusal of the appellants to receive it back and deliver the note given for the purchase price, and its use having been at their express request and under the promise that they would guarantee a good crop if Doornbos continued to use it, and they having failed to repair it as promised, Doornbos is entitled to recover the damages which he sustained by reason of this continued use.

The measure of damages in this case and the method of proof is that established in *Passinger v. Thorborn* (the famous *Bristol Cabbage Case*, 34 N. Y. 634, and see numerous cases cited therein). In that case the plaintiff was allowed to recover the difference between the value of the crop of cabbages raised from the seed sown and that which would have been raised if the seed had been Bristol cabbage seed. This case has been repeatedly affirmed, and has never been overruled to the knowledge of the respondent. (See *Dunn v. Bushnell*, 63 Neb. 568, 93 Am. St. Rep. 474, 88 N. W. 693; *Wallace v. Knoxville Woolen Mills*, 117 Ky. 450, 78 S. W. 192; *Long v. Pruyn*, 128 Mich. 57, 92 Am. St. Rep. 443, 87 N. W. 88; 35 Cyc. 643.) It has been held that where machinery intended by the parties for use in growing or harvesting a particular crop is sold, damages for injury to the crop have been allowed as special damages for nondelivery. (*Neal v. Pender-Hyman Hardware Co.*, 122 N. C. 104, 65 Am. St. Rep. 697, 29 S. E. 96; *Snowden v. Waterman*, 105

Ga. 384, 31 S. E. 110; *McCann v. Ullman*, 109 Wis. 574, 85 N. W. 493; *Bruce v. Fiss etc. Horse Co.*, 47 App. Div. 273, 62 N. Y. Supp. 96; *Russell v. Corning Mfg. Co.*, 49 App. Div. 610, 63 N. Y. Supp. 640.) It has also been held that a loss of the buyer's time, and that of his laborers, can be recovered where the circumstances of the sale were such as to put the seller upon notice that such a loss would probably result from the breach. (*Kester v. Miller*, 119 N. C. 475, 26 S. E. 115; *Optenberg v. Skelton*, 109 Wis. 241, 85 N. W. 356.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought against the defendants, as copartners under the firm name of the Gallatin Valley Trading Company, to recover damages for an alleged breach of warranty of the quality of a seed drill sold by them to plaintiff on September 1, 1911. The warranty is alleged in the complaint as follows: "That the defendants sold and delivered to the plaintiff one Peoria drill, which the defendants warranted to the plaintiff to be * * * reasonably fit and suitable for the purpose of properly sowing the divers and sundry kinds of grains—wheat, oats, rye and the like." The complaint alleges further, in substance, that the drill was not suitable for the purpose for which it was purchased; that the plaintiff used it to sow 116 acres of grain; that, as a result of the inefficiency of it, the crop harvested was much less than it would have been had the drill been efficiently serviceable; and that the plaintiff for this reason suffered damage to the amount of \$1,147.20. The answer admits the sale of the drill, alleging that the plaintiff, who is a farmer and capable of judging for himself, made a careful inspection of it, and thereupon accepted it as suitable, executing to the defendants his promissory note in payment of the purchase price, with the understanding that if the drill proved unsuitable, he might return it and receive back his note; that there was no express warranty of any kind; that the plaintiff used the drill to sow 65 acres without complaint; that, if it did

not effectually accomplish the work for which it was intended, it was due to the fault of plaintiff in handling it; and that before the commencement of this action the plaintiff returned it to the defendants and received back from them his note. It is denied that he suffered any damage whatever. The reply admits the giving of the note; admits that plaintiff returned the drill to defendants and secured from them his note; and alleges that any use made by him of the drill after he discovered its defects was at the express instance and request of defendants, and upon their warranty that it would do the work for which it was sold, and their agreement to "stand good for any damage to plaintiff by reason of his continuing the use of the same, and the promise of defendants to remedy all defects" therein. The plaintiff had verdict and judgment. The defendants have appealed from the judgment and an order denying their motion for a new trial.

At the hearing in this court, counsel for the plaintiff submitted written objections to a consideration of the appeals on the merits, and asked that they be dismissed because of an alleged omission by counsel for defendants to observe the provisions of the statute in the preparation of his record on the motion for a new trial, and his failure to have the record on appeal properly authenticated. We have examined the questions presented in this behalf, and have concluded that they are without substantial merit. It is true the notice of intention [1] states that the motion for a new trial would be made upon the minutes of the court and upon affidavits, and that the record contains what purports to be a bill of exceptions and statement of the case, which contains no affidavits. It does not appear that any affidavits were filed. While the statute (Rev. Codes, sec. 6796) requires the moving party to state in his notice whether the motion will be made upon affidavits or a bill of exceptions, or the minutes of the court, it does not require him to pursue all these methods and rely upon all the grounds indicated by the notice, though his notice states them all. If he pursues one of the authorized methods, and the record made in

pursuance thereof is so formulated as to present properly one or more of the statutory grounds, he is entitled to be heard upon the record as made. He may not notify his adversary that he will pursue one method, and thereafter change to another; nor may he state two or more methods in the alternative. (*Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654; *Cummings v. Reins Copper Co.*, 40 Mont. 599, 107 Pac. 904.) He may state all the methods conjunctively, however, and the abandonment of all except one is no reason why the motion should not be heard. It appears that the motion was heard and denied on January [2] 5, 1914, and that on January 10 the court granted defendants an extension of time in which to "prepare, serve and file their bill of exceptions and statement of the case." Thereafter a document was prepared under this caption and settled and allowed by the judge as "a bill of exceptions or statement of the case." It embodies the minutes of the trial, and was prepared, as the statute contemplates, as the record upon which the order disposing of the motion was based. We cannot conceive how the inadvertent use, by the court and counsel, of the expression "bill of exceptions" in designating the document, renders it any less a statement of the case which it also purports to be, such as is required by the statute (Rev. Codes, secs. 6799, 7114) to be presented to this court on appeal. The distinction between the two is that a bill of exceptions is prepared before the motion is submitted, whereas a statement is made up after the motion has been determined; yet the office of each is the same, viz., to bring into the technical record matters which would not otherwise constitute a part of it. In any event, since the document upon which the defendants rely was prepared as a statement of the case, its character as such is not affected by the fact that it bears a double designation.

While the judgment-roll is not authenticated by the clerk [3] technically as such, the record contains copies, properly authenticated, of the several papers which go to make it up. This is sufficient under the statute (Rev. Codes, sec. 6799) to meet all requirements.

Many errors are assigned by counsel upon rulings made during the trial in admitting and excluding evidence, and upon the action of the court in submitting its instructions to the jury. He also submits the question whether, upon the case as made by the pleadings and disclosed by the evidence, the plaintiff is entitled to recover at all. It was presented during the trial by motion for nonsuit, and also for a directed verdict. As we view the case, this question must be answered in the negative. It is therefore not necessary to consider any of the other questions submitted.

It will be noted that, while the defendants deny that they warranted the efficiency of the drill, they allege that the plaintiff [4] returned it to them and received back his note—the consideration given for it. Plaintiff admits this in his reply, and seeks to avoid the legal effect of his admission by alleging that, after the defects in the drill were discovered, he continued to use it at the request of the defendants upon the assurance by them that they would compensate him for any damage he might sustain in doing so. While, therefore, in his complaint he predicates his right to recover upon the breach of warranty, in the reply he bases his right upon the subsequent undertaking of the defendants. This constitutes a distinct departure from the contract as alleged, and cannot be the basis of recovery in this case. As we have frequently said, a reply is responsive to the affirmative matter stated in the answer, and cannot be looked to to aid the cause of action stated in the complaint. (*Thornton v. Kaufman*, 35 Mont. 181, 88 Pac. 796; *Manuel v. Turner*, 36 Mont. 512, 93 Pac. 808; *Waite v. Shoemaker & Co.*, ante, p. 264, 146 Pac. 736.)

It is not necessary to refer to the evidence. It is sufficient to say of it that, aside from that introduced to establish the amount of damages suffered by plaintiff, it tends to establish the guaranty by the defendants against any loss resulting to plaintiff from the use of the drill as alleged in the reply. The motion [5] for nonsuit should have been granted. Let it be assumed that the warranty was made as alleged. When the plaintiff,

after a fair trial of the drill, discovered the defects in it, he had these options: (1) To rescind the contract if the facts justified it and recover the purchase price—in this case his note; (2) to retain the drill and bring his action for damages for a breach of the warranty; or perhaps (3) to bring his action for the fraud practiced upon him. What the measure of damages would be in the latter two cases it is not necessary to consider at this time. If the purchaser elects to exercise the first option, he is bound [6] by his election, and cannot thereafter sue for a breach of the warranty. The measure of damages is the purchase price. (*Abraham v. Browder*, 114 Ala. 287, 21 South. 818; *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 27 L. R. A. (n. s.) 925, 101 Pac. 894; *Mundt v. Simpkins*, 81 Neb. 1, 129 Am. St. Rep. 670, 115 N. W. 325; *Weybrich v. Harris*, 31 Kan. 92, 1 Pac. 271; *Luitweiler Pumping E. Co. v. Ukiah W. & Imp. Co.*, 16 Cal. App. 198, 116 Pac. 707; *Osborne & Co. v. Poindexter* (Tex. Civ. App.), 34 S. W. 299; *Jack & Toner v. Des Moines & Ft. D. R. Co.*, 53 Iowa, 399, 5 N. W. 537. See, also, collection of cases in note to *Houser & Haines Mfg. Co. v. McKay* (*supra*), 27 L. R. A. (n. s.) 925.)

The rule as stated in these cases prevails in most jurisdictions, even though title has passed to the purchaser, and the contract does not specifically stipulate for a rescission. In this jurisdiction the right of the purchaser to rescind does not exist if title has passed to him, unless the warranty was intended to operate as a condition (Rev. Codes, sec. 5121). Subject to this limitation, the rule as stated above must be correct, for the reason that by exercising his option to rescind the purchaser has elected to extinguish the contract (Rev. Codes, sec. 5062), and by doing so has dissolved entirely his relation with the seller created by it, thus incidentally adjusting also all the rights growing out of it. In *Abraham Bros. v. Browder*, *supra*, the rule is stated thus: "There must be a subsisting contract to support an action for a breach of warranty. If the facts justify it, a buyer may rescind a contract and sue for the purchase money paid; or he may sue and recover damages for a fraud practiced upon him;

or he may affirm the contract and maintain an action for breach of warranty. He cannot insist that a contract has been rescinded, and yet recover on the contract." In *Osborne & Co. v. Poindexter*, *supra*, we find this statement: "The plaintiffs might have tendered back the machine, and demanded their notes and money, or, at their option, might elect to keep the machine, and pay the price, and sue for damages in the difference in value of the machine as represented and warranted and as it really was, and for the special damages occasioned by the breach of the warranty." To the same effect is a statement of the rule found in *Luitweiler Pumping E. Co. v. Ukiah W. & Imp. Co.*, *supra*, in support of which the court cites *Abraham Bros. v. Browder*, *supra*. "The buyer may not pursue two inconsistent remedies; if he chooses to exercise the special remedy by returning the article to the seller, he is then confined to a recovery of the purchase money paid, and cannot maintain an action for damages for a breach of the warranty." (30 Am. & Eng. Ency. Law, 2d ed., 199.) In this case the admissions in the pleadings show that the contract was rescinded. Whether this was by virtue of an express agreement made at the time of the sale, as alleged in the answer, or by mutual consent of the parties when it was discovered that the drill was defective, the result is the same.

We shall not undertake to decide the question whether the plaintiff might have recovered upon the facts stated in the reply. He cannot have recovery thereon in this case. It is sufficient for a determination of the case as now presented to say that, having admitted that he rescinded the contract, he cannot recover upon allegation of a breach of it.

The judgment and order are reversed and the cause is remanded for further proceedings.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

Rehearing denied March 29, 1915.

KEFFLER, RESPONDENT, v. WILDS, APPELLANT.

(No. 3,481.)

(Submitted February 10, 1915. Decided March 6, 1915.)

[146 Pac. 1103.]

*Partnership—"Transacting Business" Under Fictitious Name—
What Does not Constitute.*

1. K., a nonresident, purchased cattle in Montana, signing the name of "K. Bros." to the contract, although there was no such firm and he had never done business under that designation before, its use in this instance having been occasioned through carelessness, inadvertence or the lack of appreciation of its effect, and the fact that he and his brother, formerly residing together, were sometimes referred to as "K. Brothers." Section 5509, Revised Codes, provides that an individual who transacts business in a firm name must file the certificate prescribed therein. Such certificate had not been filed. *Held*, that the execution of the contract in this isolated instance, in the above circumstances, did not constitute "transacting business," so as to defeat K.'s right to sue on the contract under the penalty prescribed by the section.

[As to what constitutes a partnership, see note in 115 Am. St. Rep. 400.]

Appeal from District Court, Custer County; Sydney Sanner, Judge.

ACTION by Lambert Keffler against T. R. Wilds. From a judgment for plaintiff and an order denying a new trial, defendant appeals. *Affirmed.*

Cause submitted on briefs of counsel.

Messrs. Tison & McKinnon and Messrs. Loud, Collins, Brown, Campbell & Wood, for Appellant.

Mr. Geo. W. Farr and Mr. H. E. Herrick, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In May, 1910, a contract in writing was executed which recites that it was between T. R. Wilds, of Miles City, Montana, the party of the first part, and Keffler Bros., of Trotters, North

Dakota, the parties of the second part. The contract is signed, "T. R. Wilds, Party of the First Part," and "Keffler Bros., Parties of the Second Part," and provides for a sale of certain range cattle by the party of the first part to the parties of the second part, at a stipulated price per head. The cattle are described with reference to their condition and breeding, and \$1,500 was to be and was in fact paid down as a part of the purchase price. The contract further provides: "That should said cattle not meet the requirements of breeding, and condition guaranteed by the party of the first part, after said herd is looked over by the parties of the second part, then and in that event this contract shall be declared void and the party of the first part shall pay back to the said parties of the second part the said sum of \$1,500 paid down by them on the signing of this contract." This action was commenced by Lambert Keffler to recover the \$1,500 with interest. In his amended complaint he alleges that the contract was between him individually and Wilds, but sets forth the written instrument as a part of his pleading. He alleges the failure of Wilds to deliver the cattle according to the terms of the contract, his promise to refund the earnest-money, and his failure to keep that promise. The answer admits the due execution of the contract, denies any breach, and alleges that plaintiff was transacting business under the firm name of Keffler Bros., without having complied with the provisions of section 5509, Revised Codes, and therefore is denied the right to maintain this action. The reply is in effect a general denial of these allegations. Upon the trial plaintiff testified to the circumstances surrounding the making of the contract, to the failure of defendant to furnish the cattle according to its terms or to repay the \$1,500, and offered in evidence a letter from the defendant acknowledging the indebtedness and asking further time within which to make payment. In explanation of the use of the firm name "Keffler Bros.," plaintiff testified that the agreement was drafted by John Gibb in the presence of plaintiff, defendant and one Deffenbach; that: "The witness to the contract, Mr. Deffenbach, was with us and

introduced me to Mr. Gibb when we went in and told him what we wanted. Mr. Gibb says, 'What is the name?' and Mr. Deffenbach spoke up and says, 'Keffler Brothers,' and he looked around to me, and I says, 'Yes, that will be all right.' Q. Was there anyone else connected with you in making this contract? A. No, sir. There is no such firm as Keffler Bros., although I signed that name to this contract." He further testified that he and his brother formerly resided together and were frequently referred to as Keffler Bros., although each conducted business in his own name; and, finally, that he had not complied with the requirements of section 5509, above.

At the conclusion of the plaintiff's case, defendant moved for a nonsuit and for a directed verdict, and, these motions being denied, rested without introducing any evidence on his own behalf. The court directed a verdict for plaintiff, and from the judgment entered thereon, and from an order denying him a new trial, defendant appealed.

In this court but one question is presented, viz., the right of plaintiff to maintain this action upon the contract as it is set forth in the complaint.

Section 5509 provides that every individual who transacts business in this state under a designation purporting to be a [1] firm name shall file with the county clerk of the county in which the principal place of business is situated a certificate stating in full the name of the individual so conducting business in such firm name, and shall cause publication of the certificate to be made once a week for four successive weeks. The penalty for failure to comply with these requirements is that he shall not maintain any action upon, or on account of, any contract made in such firm name until he shall have complied with the statute. The contention of counsel for appellant is that the execution of this contract, under the circumstances set forth, constituted "transacting business" within the meaning of section 5509 above, and, since plaintiff failed to comply with the requirements of that section, he is denied the right to maintain his

action. If counsel's premise is correct, their conclusion follows as of course.

Our attention has not been called to any decided case construing a statute applicable to individuals, such as our section 5509 above; but the principle underlying this case has been under consideration many times in cases involving the right of a foreign corporation to "conduct business" or "transact business" without first complying with local laws.

In Alabama and Indiana it is held that the single act of the foreign corporation done in the exercise of its ordinary corporate functions is within the prohibition of the statute and constitutes transacting business. (*Farrior v. New England M. S. Co.*, 88 Ala. 275, 7 South. 200; *Equitable L. & Ins. Assn. v. Peed* (Ind.), 52 N. E. 201.) Following the uniform rule of practice which prevails in the federal courts, the supreme court of the United States applied the same rule of construction to the Constitution and laws of Alabama, as that announced by the highest court of that state. (*Chattanooga Nat. B. & L. Assn. v. Denson*, 189 U. S. 408, 47 L. Ed. 870, 23 Sup. Ct. Rep. 630.)

A series of acts by a foreign corporation which might be grouped as one was held to constitute "doing business" within the meaning of the Illinois statute, in *Pennsylvania v. Bauerle*, 143 Ill. 459, 33 N. E. 166.

In Kansas a distinction is drawn between an isolated act incidental only to the main purpose of the corporation's business, and a single act which is a part of its proper corporate functions. The former is held not to disqualify the foreign corporation to invoke the aid of the local courts (*Sigel-Campion L. S. Com. Co. v. Haston*, 68 Kan. 749, 75 Pac. 1028), while the latter is determined to constitute "doing business" within the meaning of the statute. (*John Deere Plow Co. v. Wyland*, 69 Kan. 255, 2 Ann. Cas. 304, 76 Pac. 863.) In this last case the Kansas court, after referring to the authorities which maintain the rule, "the doing of a single act of business in the domestic state by a foreign corporation does not constitute the doing or carrying

on of business within the meaning of the statutory and constitutional provisions," observed: "For the most part these authorities merely hold that the expression 'doing business' is not to be given such a strict and literal construction as to make it apply to any corporate dealing whatever. They turn upon the character, rather than upon the amount, of business done. This is illustrated by the fact that the particular transactions under consideration are frequently described as 'independent,' 'isolated,' 'occasional,' 'incidental,' 'accidental,' 'casual,' 'not of a character to indicate a purpose to engage in business within the state,' as well as 'single.' In the decision most frequently cited in this connection (*Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. Ed. 1137, 5 Sup. Ct. Rep. 739), stress is laid upon the circumstance that there was no purpose to do any other business in the state."

Some of the authorities which exempt an isolated act from the inhibition of laws such as ours are: 13 Am. & Eng. Ency. Law, 2d ed., 869; 19 Cyc. 1268; 6 Thompson's Com. on the Law of Corporations, sec. 7936; *Suydam v. Morris, C. & B. Co.*, 6 Hill (N. Y.), 217; *Commercial Bank v. Sherman*, 28 Or. 573, 52 Am. St. Rep. 811, 43 Pac. 658; *Hogan v. St. Louis*, 176 Mo. 149, 75 S. W. 604; *Hazeltine v. Mississippi Valley F. I. Co.* (C. C.), 55 Fed. 743; *Sparrow v. Kohn*, 109 Pa. 359, 58 Am. Rep. 726, 2 Atl. 498; *Florsheim Bros. v. Lester*, 60 Ark. 120, 46 Am. St. Rep. 162, 27 L. R. A. 505, 29 S. W. 34; *Oakland S. M. Co. v. Fred W. Wolf Co.*, 118 Fed. 239, 55 C. C. A. 93; *Gates Iron Works v. Cohen*, 7 Colo. App. 341, 43 Pac. 667; *Henry v. Simanton*, 64 N. J. Eq. 572, 54 Atl. 153; *Delaware etc. Canal Co. v. Mahlenbrock*, 63 N. J. L. 281, 45 L. R. A. 538, 43 Atl. 978; *Tabor v. Goss & Phillips Mfg. Co.*, 11 Colo. 419, 18 Pac. 537; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. Ed. 1137, 5 Sup. Ct. Rep. 739.

If the analysis of the decided cases as made by the supreme court of Kansas above is correct—and we think it is—then the solution of the question before us depends upon the character of the act in question, rather than upon the number or magni-

tude of the transactions in which plaintiff employed the firm name. That this is the correct rule seems to be borne out by the statute itself. Section 5509, above, requires that the individual who transacts business in a firm name shall cause a proper certificate to be filed with the county clerk of the county where his principal place of business is situated. This plaintiff is a resident of North Dakota, and it is inconceivable that it was the intention of the legislature that he should establish an office in this state and otherwise conform to the requirements of section 5509 in order to render valid a single transaction under the circumstances surrounding this one. He never transacted business in the firm name before, and from the fact that he testified that there is no such firm as Keffler Bros., it is fairly inferable that he does not intend hereafter to employ such designation again. Indeed, the use of the name "Keffler Bros." in this instance was occasioned through carelessness, inadvertence or a lack of appreciation of the effect such use might possibly entail. The object of the statute is prevention of fraud and imposition; and since there is no evidence of any attempt to deceive, but, on the contrary, proof that defendant fully appreciated the fact, that his business was done with Lambert Keffler individually, we conclude that the use of the firm name in this isolated instance, and, under the circumstances herein disclosed, did not infringe the statute or prevent plaintiff from invoking the aid of the courts of this state to enforce his claim.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SANNER, being disqualified, did not hear the argument and takes no part in the foregoing decision.

KEFFLER, RESPONDENT, v. WILDS, APPELLANT.

(No. 3,482.)

(Submitted February 10, 1915. Decided March 6, 1915.)

[146 Pac. 1105.]

Pleadings—Complaint — Ambiguity — Failure to Demur — Waiver.

1. Failure to demur to a complaint for ambiguity operates as a waiver of such defect, under section 6539, Revised Codes.

Appeal from District Court, Custer County; Sydney Sanner, Judge.

ACTION by Lambert Keffler against T. R. Wilds. From an order refusing to dissolve an attachment, defendant appeals. Affirmed.

Cause submitted on briefs of counsel.

Messrs. Tisor & McKinnon and Messrs. Loud, Collins, Brown, Campbell & Wood, for Appellant.

Mr. Geo. W. Farr and Mr. H. E. Herrick, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This is an appeal from an order refusing to dissolve an attachment issued in the case of *Lambert Keffler v. T. R. Wilds*, ante, p. 381, 146 Pac. 1103. The contention of counsel for appellant is that the amended complaint does not state a cause of action, and therefore will not sustain an attachment.

Our decision in the principal case is decisive of this. It cannot be said from the complaint itself that it fails to state a [1] cause of action. The complaint is very ambiguous and, if a special demurrer had been interposed, it would have been sustained without doubt; but the failure of counsel for defendant

to invoke that remedy operated as a waiver of such defect. (Rev. Codes, sec. 6539.)

The order is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY CONCURS.

MR. JUSTICE SANNER, being disqualified, did not hear the argument and takes no part in the foregoing decision.

BRICE, APPELLANT, v. BRICE, RESPONDENT.

(No. 3,483.)

(Submitted February 11, 1915. Decided March 10, 1915.)

[147 Pac. 164.]

Divorce—Support and Maintenance—Modification of Decree—Burden of Proof—Res Adjudicata—Appeal—Evidence—Affidavit.

Divorce—Support and Maintenance—Modification of Decree—Showing Necessary.

1. A modification of a decree of divorce embodying a provision for the support of the wife or children ought to be made only upon good cause shown.

[As to power of court to decree alimony after the granting of a divorce, see note in 88 Am. Dec. 657.]

Same—Burden of Proof.

2. Where a divorced wife makes application for an increased allowance for her own support, or that of her children whose custody was decreed to her, it must appear that her or their needs are such as to render a larger allowance necessary and that the husband, by reason of a change in his circumstances, is able to pay the additional amount, the burden of proof being upon the applicant.

Same—Modification of Decree—Estoppel.

3. The parties to a divorce proceeding in which a certain allowance is made to the wife for her support, by failing to appeal from the order within time, are conclusively bound thereby, even though the allowance prove inadequate.

Same—Support of Children—Effect of Agreement Between Parties.

4. While an agreement between husband and wife touching the custody and maintenance of the children will be enforced, it cannot, as against the children, divest either parent of the duty to support and educate them.

Same—Support and Maintenance—Proper Modification of Decree.

5. Where it appeared that, after transfer by a husband to his wife of all his property, amounting to \$5,000, she was granted a divorce, he to pay \$150 per annum for the maintenance of their two children, whose custody was awarded to the mother, and the latter eight years thereafter applied for a modification of the decree so as to grant a larger allowance for the maintenance of the minor daughter who was in ill health, the mother no longer being able to properly support her, and that the husband was earning a comfortable income as a physician and possessed unencumbered property amounting to \$4,000, a modification of the decree so as to require him to pay \$30 per month for the support of the daughter was proper.

[As to liability of father for support of children after divorce decree awarding custody to mother but not providing for maintenance, see note in Ann. Cas. 1913C, 296.]

Same—Appeal—Evidence—Affidavits—How Viewed.

6. Where an application for a larger allowance to a divorced wife for the support of her children, was tried in the district court wholly upon evidence in the form of affidavits, the supreme court, on appeal, will treat the application as if originally made to and tried by it, and determine the value of the evidence accordingly.

Appeal from District Court, Ravalli County; R. Lee McCulloch, Judge.

From an order modifying a decree of divorce in a suit by J. Theo. Brice against Ethel O. Brice, the plaintiff appeals. Affirmed.

Messrs. Belden & De Kalb, for Appellant, submitted a brief; *Mr. H. L. De Kalb* argued the cause orally.

The rule governing a proceeding of this nature is said to be the same as governs in proceedings to modify a decree awarding alimony or maintenance money to the wife. (14 Cyc. 813; *Ex parte Gordan*, 95 Cal. 374, 30 Pac. 561.) The procedure must be the same, as the power of court to change an award in either instance is conferred by the same section of the Code. (Sec. 3679, Rev. Codes.) There are three necessary things to be shown by the moving party in such a proceeding: 1. The needs of the applicant; 2. A material change in the circumstances of the party; 3. The ability of the opposite party to comply with a requirement to pay an additional sum. The principal point to be discussed in this brief is the showing made concerning the ability of appellant to pay an additional sum.

The courts are very reluctant to change an award. (2 Am. & Eng. Ency. Law, 2d ed., 137; *Bauman v. Bauman*, 18 Ark. 320, 68 Am. Dec. 171; *Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. Dec. 652.) The burden of proof was upon respondent. (14 Cyc. 772.)

We contend that no evidence was introduced in support of the petition, on necessary points. The law deals with two kinds of facts—ultimate or operative facts, and probative or evidentiary facts. (Phillips on Code Pleading, secs. 185–187; *Levins v. Rovegno*, 71 Cal. 273, 12 Pac. 161.) Ultimate or operative facts support a pleading, while probative or evidentiary facts are necessary in order to have value as evidence. The ultimate facts stated were appropriate so far as assisting the petition as a pleading, but wholly failed as evidence. The petition has no probative value on the necessary point of change in the financial condition of appellant. (*First Nat. Bank v. Swan*, 3 Wyo. 356, 23 Pac. 743; *Woods v. State*, 134 Ind. 35, 33 N. E. 901; *Haggin v. Lorentz*, 13 Mont. 406, 34 Pac. 607; *O'Brien v. O'Brien*, 16 Cal. App. 103, 116 Pac. 692; *Pelegrielli v. McCloud River Lumber Co.*, 1 Cal. App. 593, 82 Pac. 695; *Gay v. Torrance*, 145 Cal. 144, 78 Pac. 540; *Clark v. Jackson*, 222 Ill. 13, 78 N. E. 6; *State v. Missouri etc. Tel. Co.*, 77 Kan. 774, 95 Pac. 391; *Griffiths v. Justice's Court*, 35 Utah, 443, 100 Pac. 1064; *Robinson v. Branch Circuit Judge*, 142 Mich. 70, 105 N. W. 25; 2 Cyc. 24.) Section 7992 of the Revised Codes, permitting affidavits to be used in support of a motion, unquestionably requires probative facts to be set up where the affidavit has a function to perform as evidence. By a perusal of sections 7987, 7988 and 7989, it will be observed that an affidavit, whenever permitted, has the same effect as a deposition or as oral testimony. Only legal evidence is to be resorted to, and not hearsay. (1 Ency. Pl. & Pr. 426.)

The change of circumstances of the parties must be clearly shown. (1 Ency. Pl. & Pr. 431; *Reid v. Reid*, 74 Iowa, 681, 39 N. W. 102; *Greenleaf v. Greenleaf*, 6 S. D. 348, 61 N. W. 42; 14 Cyc. 786.)

It was proper for the parties to enter into an agreement such as is set forth in the transcript. (Sec. 3695, Rev. Codes.) Such stipulations of the parties are binding. (*Stanfield v. Stanfield*, 22 Okl. 574, 98 Pac. 334; *Law v. Law*, 64 Ohio St. 369, 60 N. E. 560; *Henderson v. Henderson*, 37 Or. 141, 82 Am. St. Rep. 741, 48 L. R. A. 766, 60 Pac. 597, 61 Pac. 136; *Storey v. Storey*, 125 Ill. 608, 8 Am. St. Rep. 417, 1 L. R. A. 320, 18 N. E. 329; *Olney v. Watts*, 43 Ohio St. 499, 3 N. E. 354; *Julier v. Julier*, 62 Ohio St. 90, 78 Am. St. Rep. 697, 56 N. E. 661; *Dickinson v. Dickinson*, 50 Colo. 232, 114 Pac. 652; *Whitney v. Whitney Elevator etc. Co.*, 180 Fed. 187, 183 Fed. 678, 106 C. C. A. 28.)

We are aware of holdings that stipulations with regard to the custody of children are not absolutely binding upon the courts; yet such stipulations are of a strong constraining force. (*Sargent v. Sargent*, 106 Cal. 541, 39 Pac. 931; 14 Cyc. 808, h.) The case at bar is analogous to *Parkhurst v. Parkhurst*, 118 Cal. 18, 50 Pac. 9. By the stipulation the appellant surrendered a valuable right. He was, by law, all things being equal, entitled to the custody of the children. (*Stats ex rel. Giroux v. Giroux*, 19 Mont. 149, 47 Pac. 798.)

The testimony being in the form of affidavits, may be fully reviewed by this court. (*Newell v. Whitwell*, 16 Mont. 243, 40 Pac. 866; *First Nat. Bank v. Hall*, 8 Mont. 341, 20 Pac. 638; *Landsman v. Thompson*, 9 Mont. 182, 22 Pac. 1148.)

Mr. E. C. Kurtz and *Mr. J. E. Shoudy*, for Respondent, submitted a brief; *Mr. Shoudy* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On December 20, 1904, the plaintiff brought his action against the defendant for a divorce on the ground of desertion. The defendant filed her counterclaim for divorce, alleging willful desertion and neglect by the plaintiff. On April 10, 1905, the defendant was granted a decree. It awarded to the defendant the custody of her two children, the fruits of the marriage, a

son, Julian, and a daughter, Lilah, aged, respectively, twelve and six years, and provided that the plaintiff should thereafter pay to the clerk annually, to be expended for their maintenance, the sum of \$150 or \$75 for each, one-half payable on May 1 and the other on November 1 each year until further order. No provision was made for the support of the defendant. On October 20, 1913, the defendant filed her petition in the case, asking that the court modify the decree so as to make it provide that plaintiff pay to her for her support a lump sum of \$2,000, to meet her existing necessities, and thereafter to pay her monthly the sum of \$100. She asked, also, that the plaintiff be required to pay at once to her the sum of \$1,000, and thereafter the sum of \$75 monthly for the maintenance of the daughter, the son having in the meantime attained his majority. The hearing was upon the sworn petition and plaintiff's answer thereto, the parties supporting their respective allegations by affidavits. On December 26 the court made an order refusing to allow the defendant any amount, but modifying the decree so as to require the plaintiff to pay to the clerk immediately the sum of \$30, and thereafter a like sum on the first day of each month until further order, for the maintenance of the daughter. The plaintiff has appealed.

The contention is made that the evidence submitted was insufficient in several particulars to justify a modification of the decree, all of which may be stated under two heads, *viz.*, that it does not appear that the plaintiff has the means or ability to pay any greater amount than that allowed by the decree, and that it does not appear what the needs of the daughter are. It is contended, further, that the court abused its discretion in modifying the decree, because it appears that the allowance made therein was fixed by stipulation of the parties, and no sufficient reason appears why the stipulation should be disregarded.

In this class of cases the power of the court to provide for the support of the divorced wife is derived from section 3679 of the Revised Codes, which provides: "Where a divorce is granted for an offense of the husband, the court may compel

him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively; and the court may, from time to time, modify its orders in these respects."

A modification of a decree embodying a provision for the [1] support of the wife ought not to be made except upon good cause shown. (*Barrett v. Barrett*, 41 N. J. Eq. 139, 3 Atl. 689; *Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. Dec. 652.) When the application is made by the wife for an increase of her [2] allowance, it must appear that her circumstances have so changed that her needs are such as to render a larger allowance necessary, and that the husband is able, by reason of a change in his circumstances, to pay the additional allowance. The essential facts authorizing or requiring the modification must be established by competent evidence, as in any other case, the burden of proof being upon the applicant. (*Glasscock v. Glasscock*, 94 Ind. 163.) The reason for the rule is that it must be presumed that in fixing the amount of the allowance in the decree in the first instance, a full disclosure was made of the conditions as they existed at that time, and that the court thereupon fixed such an amount as they justified. That the allowance so made is inadequate is not ground for the modification of the decree, but a matter subject to correction on appeal; [3] the parties being conclusively bound thereby if they acquiesce in the result until the time for appeal has elapsed. (*Ex parte Spencer*, 83 Cal. 460, 17 Am. St. Rep. 266, 23 Pac. 395; *Bauman v. Bauman*, 18 Ark. 320, 68 Am. Dec. 171; *Buckminster v. Buckminster*, *supra*; 2 Bishop on Marriage, Div. & Sep. 877.) The same rule must, in a general way, be regarded as governing applications for a change in the decretal order making provision for the children, though the power of the court is not founded exclusively upon section 3679, *supra*. This is applicable to cases only in which the ground of divorce is the fault of the husband. Under section 3678 the court may, in any case, before or after

judgment, make such provision for the children as the circumstances require; for though under the decree the husband may be relieved entirely from any obligation to provide for the wife, the court may nevertheless, under section 3678, upon proper application, make such order for their custody and maintenance as the circumstances justify. (*Pearce v. Pearce*, 30 Mont. 269, 76 Pac. 289.) As between the husband and wife, an agreement [4] touching the custody and maintenance of the children will be respected and enforced, yet such an agreement cannot, as against the children, divest either parent of the paramount duty imposed upon both by law to support and educate them. (Rev. Codes, secs. 3741, 3742.)

It appears from the evidence that prior to the trial resulting in the decree, the plaintiff conveyed to the defendant all the [5] real estate he then had. From a sale of the property thus conveyed to her, she afterward realized about \$5,000, part of which she invested in other real estate in Gainesville, in the state of Georgia. At the present time she possesses this property and her household effects, of an assessed value of \$2,150. She is in debt, however, to the amount of \$1,800. Until within a few months she has been gaining a support by keeping boarders or working at such employment as she has been able to secure, being the sole provider for the support of the daughter, and also the son, who is affected with epilepsy, and cannot maintain himself. There is evidence tending to show that the property above referred to is of the actual value of \$3,000. For some time defendant has been in ill health, unable to keep boarders. Her revenue from this source has thus been cut off. The daughter is not in good health and cannot contribute to her own support. Before the decree of divorce was granted, it was agreed by the parties in writing that in case the court found that the defendant was entitled to a divorce, she should have the "custody and education" of the children, the consideration named being that the defendant should not offer any evidence derogatory to the plaintiff's moral character, or that he was unfit to have the custody

of the children. By the conveyance referred to, the plaintiff left himself entirely destitute of property. He is now engaged in the practice of medicine, enjoying an income from that source which, he stated in his affidavit, is sufficient to support himself and his present wife comfortably. He is possessed of real estate of the value of \$4,000, which is encumbered to the amount of \$1,500, and owns personal property of the value of \$500.

The showing made in support of the application is not as explicit as it might be as to the ability of the plaintiff to contribute to the support of his daughter to the amount awarded by the order. It is not more explicit as to what the daughter's particular needs are. On the whole, however, treating the [6] application as if made originally to this court, which, under the rule governing our review of the order, we must do, because the evidence is all embodied in the form of affidavits, the evidentiary value of which we can determine as well as the district court (*Newell v. Whitwell*, 16 Mont. 243, 40 Pac. 866; *Wilson v. Barbour*, 21 Mont. 176, 53 Pac. 315; *Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76), we think the order should be sustained.

The affidavits disclose these facts, which in our opinion are controlling: That the mother is in straitened circumstances, having practically exhausted the means which were given her by her husband; that the daughter is at the age when, more than at any other, she needs care and attention and protection from want, and that the father is in comfortable circumstances and, therefore, is presumably able to aid in her support. It is not of importance to inquire how the financial condition of the mother has been brought about. The fact that she has been extravagant, as some of the witnesses state, cannot serve to excuse the father from his duty. The mother is entitled, under the stipulation, to the custody of the daughter. This casts upon her primarily the burden of education and support (sec. 3741); yet, this does not divest the father of the duty to meet his obligation when the mother can no longer support the burden

assumed by her. The interest of the daughter is the paramount consideration.

The order is affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

MORRISON, APPELLANT, v. LINN ET AL., RESPONDENTS.

(No. 3,486.)

(Submitted February 13, 1915. Decided March 12, 1915.)

[147 Pac. 166.]

*Adverse Possession—Payment of Taxes—"Color of Title"—
"Claim of Title"—Distinction—Extent of Right Acquired—
Constructive Possession.*

Adverse Possession—How Title may be Acquired.

1. Title to land may be acquired, as against one having the record title, by holding adverse possession thereof for the period of the statute of limitations, even though the claim was initiated by a naked trespass.

[As to the essentials of adverse possession, see notes in 28 Am. St. Rep. 158; 88 Am. St. Rep. 701.]

Same—Payment of Taxes.

2. Payment of taxes is not an element of adverse possession, unless made so by statutory requirement.

Same—Holding Under "Color of Title"—Definition.

3. One holding land under a written instrument, a statute, or a judgment or decree of court, which appears to convey to or confirm title in him, but does not do so in fact, holds under "color of title."

[As to what amounts to color of title sufficient to sustain adverse possession, see notes in 14 Am. Dec. 580; 88 Am. St. Rep. 701.]

Same—Holding Under "Claim of Title"—Definition.

4. Adverse possession of land under "claim of title" held to mean the claim asserted by the disseisor of his intention to appropriate and use the land as his own, to the exclusion of the rights of all persons, irrespective of any color, right or title as the foundation of his claim.

Same—Extent of Right Acquired—Constructive Possession.

5. A claimant of land by adverse possession under color of title for the statutory period obtains title to the entire tract described in his muniment; but one relying upon claim of title secures only so much of the land as he actually possesses, there being no constructive possession under mere claim of title.

Appeal from District Court, Custer County; C. C. Hurley, Judge.

ACTION by R. C. Morrison against Samuel H. Linn, Gertrude Coleman and another. Judgment for defendants, and plaintiff appeals from it and an order denying his motion for new trial. Reversed and remanded with directions to enter a decree in favor of plaintiff.

Mr. Frank Hunter, for Appellant, submitted a brief and argued the cause orally.

The nonpayment of taxes by one in possession of land is insufficient in itself to show the holding was not adverse when such adverse holding is clearly shown by competent evidence. (*Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914.) The payment of taxes by a person in possession of land is not necessary in order that the possession may ripen into title. (*Silverstone v. Hanley*, 55 Wash. 458, 104 Pac. 767.) In a suit to recover land, defendant could avail himself of the statute of limitations, though he had not paid the taxes on the land during the running thereof. (*Anderson v. Canter*, 10 Kan. App. 167, 63 Pac. 285; see, also, *Brose v. Boise City Ry. & T. Co.*, 5 Idaho, 694, 51 Pac. 753; *Rydalch v. Anderson*, 37 Utah, 99, 107 Pac. 25; *Strong v. Baldwin*, 154 Cal. 150, 129 Am. St. Rep. 149, 97 Pac. 178; *Lucas v. Provines*, 130 Cal. 270, 62 Pac. 509.) The payment of taxes on land by one claiming adversely under color of title cannot aid his claim, where the owner of the legal title also paid taxes on the land for the same years. (*Northern Pac. Ry. Co. v. Littlejohn*, 198 Fed. 700.)

"Claim of title" is where one enters and occupies land, with the intent to hold it as his own, against the world, irrespective of any shadow or color of right or title as a foundation for his claim. (*Carpenter v. Coles*, 75 Minn. 9, 77 N. W. 424; *Crowder v. Doe*, 162 Ala. 151, 136 Am. St. Rep. 17, 50 South. 230.)

Adverse possession embraces four essential points: (1) The possession must be adverse and with an intent to disseise;

(2) the possession must be actual or constructive; (3) the possession must be open and notorious; and (4) the possession must be exclusive and continuous for the statutory period. (1 Am. & Eng. Ency. Law, 2d ed., 789.) The trial court found all these things in favor of plaintiff, but withheld judgment because it conceived that a squatter or a naked possessor could not establish title in himself by adverse possession. The findings do not support the conclusions of law and the judgment as rendered; they do plainly support the opposite conclusion, and the judgment should have been for the plaintiff quieting title in him. In support thereof the appellant invites the court's attention to these decisions: *Monnot v. Murphy*, 207 N. Y. 240, 100 N. E. 742; *Baughner v. Boley*, 63 Fla. 75, 87, 58 South. 980; *Swope v. Ward*, 185 Mo. 316, 84 S. W. 895; *Wilkerson v. Eilers*, 114 Mo. 245, 21 S. W. 514; *Campbell v. Brown* (Mo. App.), 130 S. W. 50; *Gardner v. Wright*, 49 Or. 609, 91 Pac. 286.

The case of *Carpenter v. Coles*, 75 Minn. 9, 77 N. W. 424, bears out the appellant's contention, and likewise the following: *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431; *Mauldin v. Cox*, 67 Cal. 387, 7 Pac. 804; *Baldwin v. Durfee*, 116 Cal. 625, 48 Pac. 724; *Lyons v. Stroud*, 257 Ill. 350, 100 N. E. 973; *Craven v. Craven* (Ind.), 103 N. E. 333, 334; *Ward v. Nestell*, 113 Mich. 185, 71 N. W. 593; *Warren v. Bowdran*, 156 Mass. 280, 31 N. E. 300; *Pendo v. Beakey*, 15 S. D. 344, 89 N. W. 655; *Cerveney v. Thurston*, 59 Neb. 343, 80 N. W. 1048; *Foulke v. Bond*, 41 N. J. L. 527; *Yetzer v. Thoman*, 17 Ohio St. 130, 91 Am. Dec. 122; *Jangraw v. Mee*, 75 Vt. 211, 98 Am. St. Rep. 816, 54 Atl. 189; *Ovig v. Morrison*, 142 Wis. 243, 125 N. W. 449.

Messrs. Farr & Herrick, for Respondents, submitted a brief; *Mr. Geo. W. Farr* argued the cause orally.

An examination of the cases cited by appellant will disclose that they are not in point with the case at bar, and that in each case there are facts which are not applicable to the case at bar. A claim of title is defined as a claim having some appearance of legality, not a mere prior claim without the appearance or

pretense of anything to base it upon. (7 Cyc. 183.) It is evident from Morrison's own testimony that he did not claim any right whatsoever to the land. It is therefore evident that the principal element of adverse possession is lacking. While color is, as a general rule, not necessary to the acquisition of title by adverse possession, claim of title or right by occupancy is in all cases necessary. (1 Cyc. 1028.) In the case of *Peter v. Stephens*, 11 Mont. 115, 28 Am. St. Rep. 448, 27 Pac. 403, the court held, in commenting upon certain instructions given relative to the question of adverse possession: "Their purport was that if the plaintiff's title was found to be the paramount title and any of the defendants entered upon and took possession of the land without title or claim or color of title, that such occupancy was not adverse to the title of the plaintiff but subservient thereto. We think this law is too well settled to enter argument to sustain it. Where there is no claim of right the possession cannot be adverse to the true title." In the case of *Thompson v. Felton*, 54 Cal. 547, the court holds that there must, to constitute adverse possession, not only be actual occupancy of the land in question, but also a claim of title hostile to that of the true owner. This contention of the respondent is also supported by the following authorities: *Chapman v. Dean*, 58 Or. 475, 115 Pac. 154; *Ramsey v. Wilson*, 52 Wash. 111, 100 Pac. 177; *Doe v. Eslava*, 11 Ala. 1028; *Thompson v. Pioche*, 44 Cal. 508; *Chicago etc. Ry. Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; *Maple v. Stevenson*, 122 Ind. 368, 23 N. E. 854.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1912 this action was brought to have determined the conflicting claims to lot 5, in section 28, township 8 north, range 47 east, in Custer county, Montana. In his complaint plaintiff alleges that for more than ten years prior to the commencement of the action he was in the actual, open, notorious, continuous, exclusive and adverse possession of the land under claim of title thereto. The answering defendant Samuel H. Linn asserts that

he and his codefendant Gertrude Coleman hold the legal title to the land; otherwise the answer is a general denial of the allegations of the complaint. The trial court found that in 1900 plaintiff took possession of the land and erected certain fences, which, with natural barriers, constituted a substantial inclosure of the tract; that since the date of his entry, plaintiff has been in "continuous, open, notorious and actual, peaceable and exclusive possession of lot 5"; that at the time he went into possession he knew the land was owned by someone else; that he never paid any taxes upon the property, but all taxes were paid by defendant Linn. The court's findings further recite: "There is no evidence introduced showing that at the time the plaintiff took possession of said lot 5 he had any claim of title, or made any pretense of having title, to said lot. Under these circumstances, the court is unable to conceive of any theory upon which the plaintiff held possession of said premises under a claim of title exclusive of any other right as provided in section 6438 of the Revised Codes." In conclusion, the court determined that: "Plaintiff has acquired no right, interest or title in or to the said lot 5 adverse to, or superior to, the title of the said defendant Samuel H. Linn." From a judgment entered in favor of defendant Linn, and from an order denying a motion for a new trial, plaintiff appealed.

In this court the respondent contends that the finding that plaintiff did not hold possession of the land under a claim of title is sustained by the evidence. For the purposes of these appeals, the case might have been submitted upon an agreed statement of facts, for there is not any conflict in the testimony upon any matter material to a determination of the controversy. The evidence is undisputed that during the entire time of his occupancy of the land, plaintiff claimed it as his own as against everyone else, that he inclosed it and used it for the only purpose for which it was adapted; that he exercised every act of ownership and exclusive control of the property, and that these facts were generally known to the people living in the vicinity. He did not pay the taxes upon the land, and his original entry was

a trespass. He did not have or claim to have any paper title to the land.

Some incidental questions may be disposed of summarily: One [1, 2] may by adverse possession of land, for the period of the statute of limitations, acquire title thereto. (*National Min. Co. v. Powers*, 3 Mont. 344.) "Payment of taxes is not an element of adverse possession, unless made so by statutory requirement." (1 Cyc. 1106.) In the absence of any statute upon the subject in this state, the general rule just stated prevails.

The controversy here is waged about the meaning of "claim of title, as used in section 6438, Revised Codes, and the possibility of a trespasser initiating a right which may ripen into a title by adverse possession. The authorities are quite uniform in holding that, in order to prevail over the record title, it is indispensable that the adverse claimant maintain his possession throughout the entire period of the statute of limitations, under either "color of title" or "claim of title" in himself; otherwise the law will presume his possession to have been subservient to the legal title. This rule prevails in this state by virtue of positive statutes. (Rev. Codes, secs. 6436-6438.)

Much needless confusion has been introduced into the books by [3] the ill-advised use of "color of title" and "claim of title" as synonymous. Indeed, the confusion is apparent in our own Codes. Section 6436 considers a "claim of title" founded upon a written instrument, or a judgment or decree of court. Since the section is treating of title by adverse possession, and not of muniments which convey or confirm valid title, it is clear that our legislators fell into the common error and misused the phrase; for one who holds land under a written instrument, a statute or a judgment or decree of court which appears to convey or confirm title, but does not do so in fact, holds under "color of title"; that is to say, he holds by virtue of something which gives him a colorable title only. This is the meaning of the phrase as used by discriminating courts and text-writers. (1 Rul. Case Law, 707.)

In *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351, "color of title" is defined as follows: "What is meant by *color of title*? It may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used—a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law."

In *Hall v. Law*, 102 U. S. 461, 26 L. Ed. 217, it is said: "Whenever an instrument, by apt words of transfer from grantor to grantee—whether such grantor act under the authority of judicial proceedings or otherwise—in form passes what purports to be the title, it gives color of title." In the note to *Jasperson v. Scharnikow*, 15 L. R. A. (n. s.), at page 1218, will be found a long list of decided cases sustaining the correctness of these definitions.

It may be observed, in passing, that "color of title" does not depend upon the validity or effect of the instrument, but entirely upon its intent and meaning. (*Hindley v. Manhattan Ry. Co.*, 185 N. Y. 335, 78 N. E. 276.) It may be in fact altogether invalid or ineffective for the purpose intended, but if it describes the land with sufficient certainty, purports to convey it, and is not void on its face, it gives color of title. (*Allen v. Mansfield*, 108 Mo. 343, 18 S. W. 901.) Sections 6436 and 6437 treat of adverse possession under color of title, as that phrase should be used.

As distinguished from "color of title," "claim of title" does [4] not depend upon any writing, statute or judgment or decree of court. As used to characterize adverse possession, "claim of title" means nothing more than the claim asserted by the dis-seisor of his intention to appropriate and use the land in question as his own, to the exclusion of the rights of all persons, and that, too, irrespective of any semblance of color, or right, or title, as the foundation of his claim. (1 Rul. Case Law, 707; *Warren v. Bowdran*, 156 Mass. 280, 31 N. E. 300; *Crowder v. Doe*, 162 Ala. 151, 136 Am. St. Rep. 17, 50 South. 230; *Carpenter v. Coles*, 75 Minn. 9, 77 N. W. 424.) While it is indispensable to defeat

the holder of the legal title that the disseisor shall maintain his adverse possession throughout the entire statutory period, under either color of title or claim of title, it is not necessary that his initial entry into possession should be made under any pretense of right or title. From the days of Lord Coke to the present, the rule has been recognized quite generally that the adverse claimant may initiate his claim by a naked trespass. Under section 6438, above, it is difficult to conceive of a case where the adverse claim could have its initial foundation in anything else than a trespass. In *Carpenter v. Coles*, above, the trial court instructed the jury that: "A person has not any right, arbitrarily or without any claim of right, knowing that he has no right whatever, to go and take with a high hand wrongful possession of land, and avail himself of the statute of limitations." Another of like import was given, and concerning them the supreme court said: "The meaning of these instructions is that the statute will never run in favor of a disseisor whose adverse possession originated in a naked and willful trespass; that to set the statute in motion the entry must have been made under some color or claim of title which the disseisor claimed gave him the legal right to enter. This is clearly incorrect, for the books are full of cases where tortious entries upon and possession of land without any pretense of title or rightful claim to the land have ripened into title of adverse possession." In the note to *Jasperson v. Scharnikow*, above, 15 L. R. A. (n. s.), at page 1233, the authorities supporting this view will be found assembled at length. There are a few isolated cases to the contrary, but the decided weight of authority sustains the rule announced.

While the adverse claimant under color of title for the statutory period obtains title to the entire tract described in his muniment, if it has been subjected to proper use, the one who relies upon claim of title secures only so much as he actually possesses. There cannot be constructive possession under mere claim of title. This is the doctrine of the decided cases and the meaning of our Code, sections 6436, 6437, 6438 and 6439. (1 Cyc. 1122, 1125; 1 Rul. Case Law, 726.)

The trial court erred in failing to find that plaintiff's possession was adverse, as requested, and likewise erred in determining that his possession was not maintained under claim of title within the meaning of section 6438.

The judgment and order are reversed, and the cause is remanded to the district court, with directions to enter a decree in favor of plaintiff and against the defendant Linn for the relief to which he is entitled.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY concurs.

MR. JUSTICE SANNER, being disqualified, did not hear the argument, and takes no part in the foregoing decision.

STATE EX REL. GIBSON, RELATOR, v. STEWART ET AL.,
RESPONDENTS.

(No. 3,623.)

(Submitted February 16, 1915. Decided March 15, 1915.)

[147 Pac. 276.]

Mandamus—State Lands—Leases—Sales—Discretion—Parties.

State Lands—Leases—Sales—Discretion—Mandamus.

1. The question whether state lands lying within three miles of the limits of a city or town shall be leased or sold, being one addressed to the sound discretion of the state board of land commissioners, *mandamus* does not lie to compel such board to entertain an application to lease.

[As to *mandamus* against public officers, see note in 98 Am. St. Rep. 863.]

Same—Mandamus—Indispensable Parties.

2. Where a tract of state land had been sold and a certificate of sale issued, the purchaser was an indispensable party to a proceeding in *mandamus* to compel the state board of land commissioners to cancel such certificate and entertain an application to lease the land.

[As to who are necessary parties to proceedings in *mandamus*, see note in 105 Am. St. Rep. 122.]

Original application for writ of mandate, by the State, on the relation of Paris Gibson, against Samuel V. Stewart and others,

constituting the State Board of Land Commissioners, to compel the cancellation of a certificate of sale and consider relator's petition to lease the land covered by it. Dismissed.

Messrs. Cooper, Stephenson & Hoover, for Relator, submitted a brief.

Mr. D. M. Kelly, Attorney General, *Mr. J. H. Alvord*, Assistant Attorney General, and *Mr. Wm. T. Pigott*, for Respondents, submitted a brief; *Mr. Alvord* and *Mr. Pigott* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Pursuant to the grant contained in the Enabling Act, the state of Montana became the owner of the west one-half of the north-west one-fourth of section 23, township 20 north, range 3 east, in Cascade county. On September 20, 1912, this land was sold in one piece or parcel by the state board of land commissioners to Wm. Beebee for \$18 per acre, and a certificate of purchase issued to him. The land lies less than three miles from the city limits of the city of Great Falls. On October 28, 1914, this relator applied to the board to lease the same piece of land, but his application was rejected, for the reason that the land had been sold. This proceeding was thereupon commenced to compel the board to cancel the Beebee certificate and consider relator's petition to lease. To the affidavit and alternative writ a motion to quash was interposed, and the matter is before us for determination.

Relator grounds his right to relief upon the contention that the sale to Beebee was absolutely void. By section 1 of Article XVII of the state Constitution, state lands are divided into four classes. Class 4 comprises "lands within the limits of any town or city or within three miles of such limits." Section 2 of the same Article provides for the sale or lease of lands of the first or third class, for the sale of lands of the second class or the timber

thereon, and then concludes: "The land of the fourth class shall be sold in alternate lots of not more than five acres each, and not more than one-half of any one tract of such lands shall be sold prior to the year one thousand nine hundred and ten (1910)." It is insisted that the sale of this land in a single tract, comprising eighty acres and belonging to the fourth class, was in direct violation of this constitutional provision, and therefore void. Whether this be so or not, there are at least two insuperable barriers to relator obtaining the relief he seeks by this proceeding:

1. While lands of the first and third class may be sold or leased, the board is commanded to sell lands of the fourth class, and nothing is said about leasing them. If, however, authority [1] to lease such lands be held to be derived from the Enabling Act, the utmost that can be said is that permission was given the state to lease without requiring it to do so. The language is: "That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company," *etc.* (Sec. 11.) Apparently the legislature acted upon the assumption that authority to lease *any* state lands had been conferred upon the state; for in 1899 it provided: The state board of land commissioners "may from time to time direct that the lands belonging to the state be offered for sale and lease at public auction to the highest bidder." (Laws 1899, p. 88; Rev. Codes, sec. 2161.) Under this Act no obligation is imposed upon the board to sell or lease state lands, or to sell or lease at all to any particular individual. Not until after state land has been offered for sale, and no bid therefor has been received, is a duty imposed to offer it for lease. (Sec. 2162.) Assuming the authority existed to lease, then the question whether this particular parcel of land should be offered for sale or lease in

any proper manner whatever was referable to the sound discretion of the board; and it is elementary that *mandamus* will not lie to control mere discretion. (*State ex rel. Hickey v. District Court*, 23 Mont. 564, 59 Pac. 917; *State ex rel. Dempsey v. District Court*, 24 Mont. 566, 63 Pac. 389; *State ex rel. Finlen v. District Court*, 26 Mont. 372, 68 Pac. 465; *State ex rel. La France C. Co. v. District Court*, 40 Mont. 206, 105 Pac. 721.) *Mandamus* will lie only "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." (Rev. Codes, sec. 7214; *State ex rel. Knight v. Helena P. & L. Co.*, 22 Mont. 391, 44 L. R. A. 692, 56 Pac. 685.) Since consideration of relator's application to lease is not a duty specially enjoined upon the board, *mandamus* will not lie in this instance to compel such consideration.

2. Beebee is the holder of the legal title to the land. He is [2] not a party to this proceeding; but, if his certificate should be canceled, his interests would be adversely affected. It is elementary that he cannot be deprived of his property without a hearing—without his day in court. He is not only a necessary, but an indispensable, party to any proceeding which seeks the cancellation of his certificate. (*Wright v. Commissioners*, 6 Mont. 29, 9 Pac. 543; *Stethem v. Skinner*, 11 Idaho, 374, 82 Pac. 451; *State v. State Board*, 7 Wyo. 478, 53 Pac. 292; 26 Cyc. 415, 416.)

The motion to quash is sustained, and the proceeding is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

MULLERY, RESPONDENT, v. GREAT NORTHERN RY. CO.
ET AL., APPELLANTS.

(No. 3,477.)

(Submitted February 10, 1915. Decided March 16, 1915.)

[148 Pac. 323.]

Personal Injuries—Master and Servant—Railroads—Assumption of Risk—Contributory Negligence—Choice of Ways—Earning Capacity—Evidence—Instructions—Excessive Verdict—Trial—Peremptory Challenges.

Trial—Peremptory Challenges—“Each Party”—Definition.

1. The provision of section 6740, Revised Codes, that “each party” to a civil action shall be entitled to four peremptory challenges, *held to* mean each side or party litigant, and not each person of whom the respective sides or parties litigant are made up.

Same—Antagonistic Codefendants—Peremptory Challenges.

2. Though each of two or more codefendants who are hostile to each other is entitled to the number of peremptory challenges of jurors allowed by section 6740, Revised Codes, to parties litigant, where neither their joint answer, which asserted defenses common to all, nor the evidence disclosed any conflict of interest, they constituted but one party and as such were entitled to but four peremptory challenges under the rule declared in paragraph 1, *supra*.

Personal Injuries—Railroads—Tracks upon Premises of Another—Care Required.

3. The rule that railway companies must, in the operation of their engines and cars, exercise ordinary care to avoid injury to persons whose rightful presence upon or near their tracks is to be anticipated, has especial application to cases where the tracks are upon premises and within structures belonging to the employer of the injured.

Same—Positive and Negative Testimony—Weight—Jury Question.

4. The conflict presented by the positive testimony of defendant company's train crew that the bell of its locomotive was ringing at the time of the accident, and the negative statements of plaintiff and his witnesses that they heard no bell, was one properly submitted to the jury for solution.

Same—Codefendants—Verdict as to One—Effect.

5. Where the complaint in a personal injury action charged the defendant railway company with primary negligence as well as with responsibility for the failure of its switching crew—two members of which only were made defendants—to exercise care in making a coupling and to ring the bell of the locomotive, and the jury found against all, though the evidence did not connect the individual defendants with the cause of the injury, a reversal of the judgment as to them did not necessitate the same result as to the company.

Same—Master and Servant—Assumption of Risk—Appreciation of Danger.

6. Where recovery of damages for personal injuries is sought to be defeated because plaintiff, with full knowledge and appreciation of the danger of his situation did not exercise any care for his safety, the danger appreciated must be the one from which the injury arose.

[As to remote and proximate cause, see note in 36 Am. St. Rep. 807.]

Same—Contributory Negligence.

7. An employee who, while in the discharge of his duties, was injured by a sudden and unexpected movement of cars which had been standing on a track upon his employer's premises, without an engine attached, and of any contemplated movement of which he was entitled to be warned but was not, and who before stepping into the place where he was hurt stopped, looked and listened, may not be said to have been guilty of negligence as matter of law.

Same—Evidence—Admissions—Jury Question.

8. Whether immediately after the accident, plaintiff made statements that his injury was due to his own carelessness—of which he disclaimed any recollection—whether, when made, he was fully conscious of their purport, and whether their purport constituted an admission of legal negligence, were questions for determination by the jury.

Same—Contributory Negligence—Choice of Ways.

9. In applying the rule that contributory negligence will be imputed, as a matter of law, to an employee who, in the performance of a duty, knowingly and voluntarily chooses a way which is dangerous in preference to one which is safe, or one which is more dangerous than the one he selects, regard must be had to the circumstances and the right of the chooser to assume that others whose negligence may jeopardize his safety will proceed in the customary manner and with reasonable care.

Same—Choice of Ways.

10. In balancing ways for the purpose of making a choice, the rule requires only such a choice as under all the known or obvious circumstances a reasonably prudent person might make, and not an unerring one viewed in the light of after-events.

[As to assumption of risk and contributory negligence in law of master and servant, see notes in 97 Am. St. Rep. 884; 98 Am. St. Rep. 289.]

Same—Earning Capacity—Evidence—Admissibility.

11. Where plaintiff, by trade a carpenter, was injured while working in a smelter, he was not, in showing his earning capacity, confined to his then occupation as a standard, but was properly allowed to introduce evidence that the going wage of carpenters at the place of the accident was \$1.75 per day more than he was receiving at the time of its occurrence.

Same—Earning Capacity—Proper Instruction.

12. An instruction authorizing the jury to consider plaintiff's disability, if any, to pursue his usual vocation, in addition to the impairment of his earning capacity, in arriving at their verdict, *held* not open to objection.

Same—Verdict not Excessive.

13. Plaintiff was earning \$3.25 per day when hurt; his injuries consisted of a scalp wound, the loss of two fingers of his right hand, and the crushing of a third, the fracture of a bone of the thumb of the left hand, inside of which a growth is developing; he was unable to work for four months; has lost his earning capacity as a carpenter and an all-around man, suffered pain and sustained a permanent mutilation. *Held*, that a verdict for \$5,000 was not excessive.

[As to excessiveness of verdict in action for personal injuries, see note in Ann. Cas. 1913A, 1361.]

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

ACTION by Vincent W. Mullery against the Great Northern Railway Company and others. Judgment for plaintiff. Defendants appeal from the judgment and from an order denying their motion for new trial. Affirmed as to appellant company, and reversed as to appellants William Welch and Thomas Lynch.

Messrs. Veazey & Veazey, for Appellant Railway Company, and *Mr. Stephen J. Cowley*, for Appellants Welch and Lynch, submitted a brief; *Mr. I. Parker Veazey, Jr.*, argued the cause orally.

Error in refusing to recognize challenges: We contend, that, under the statutes of Montana, first, there is no obligation on the part of the defendants in a civil case to join in a challenge that each defendant is entitled to challenge jurors separately; and, secondly, that, in the exercise of such separate challenge, each defendant is entitled to four peremptory challenges. In so far, of course, as the defendants join in challenging the same juror, it is true, then, that each has been allowed a challenge in each instance, but there is no authority in the court to compel them to agree upon the challenges and to join in the same, or to refuse to recognize separate challenges interposed by each defendant to a different juror. Where different proof is necessary in order to establish liability against each defendant, separate challenges are necessary. Thus, where two connecting railroads are sued for damage in transit, each is entitled to separate challenges. So here, where the plaintiff sought to hold the defendant railway company for acts of its engineer and fireman, it was entitled to a separate challenge, and likewise were the individual switchmen entitled to the same right. The switchmen would be liable over to the railway company; it was to their interest to establish negligence on the part of others, so as to exonerate themselves. But the authorities do not review statutes as express as ours. (See *Texas & P. Ry. Co. v. Stell* (Tex. Civ.), 61 S. W. 980; *Rogers v. Armstrong Co.* (Tex. Civ.), 30 S. W. 848; *Hogsett v. Northern Texas Trac-tion Co.*, 55 Tex. Civ. 72, 118 S. W. 807; *Waggoner v. Dodson*,

96 Tex. 6, 68 S. W. 813, 69 S. W. 993; *First Nat. Bank v. San Antonio etc. Railway Co.*, 97 Tex. 201, 77 S. W. 410; *Hannay v. Harmon* (Tex. Civ.), 137 S. W. 406; *McLaughlin v. Carter*, 13 Tex. Civ. 694, 37 S. W. 666; *Flowers v. Flowers*, 74 Ark. 212, 85 S. W. 242.)

The theory that the plaintiff was a carpenter by trade was wholly fanciful, and evidence of the wages paid to carpenters was too remote in point of time and attendant circumstances in this case to have any fair or proper bearing. (*Hubbard v. Mason City*, 60 Iowa, 400, 14 N. W. 772; *Hobel v. Mahoning etc. Ry. & L. Co.*, 229 Pa. 507, 79 Atl. 119; *Chicago etc. Electric Ry. Co. v. Spence*, 213 Ill. 220, 104 Am. St. Rep. 213, 72 N. E. 796; *West Chicago Ry. Co. v. Maday*, 188 Ill. 308, 58 N. E. 933.) We appreciate that the test is not the actual work in which the plaintiff may temporarily be engaged, for, if such were the rule, a person temporarily idle would have no earning capacity. It is nevertheless well recognized that evidence as to plaintiff's earning capacity must be limited to the actual conditions of the case, and to occupations with which the plaintiff may be said to have, at the time, some real, substantial, direct connection, either in fact or in reasonable expectation, and that evidence as to former occupations of the plaintiff for a brief period of two years in his entire life, remote in point of time and circumstances, should not be received by the jury.

The verdict is plainly excessive and should be at all events reduced. This is a matter which rests so largely in the discretion of the court, as to which no hard-and-fast rule can be laid down, that a citation of authorities is not particularly helpful. Each case must be considered on its own facts, but here we emphasize that a laborer, already advanced in age beyond half a century, is awarded substantially \$2,500 a finger, although, at slightly different labor, he, at the end of four months, has been, and now is earning exactly the same as before. (See *Louisville etc. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866; *Kansas Pac. Ry. Co. v. Peavey*, 34 Kan. 472, 8 Pac. 780.) In the following cases verdicts are held excessive, but simply re-

duced. Like the above, they are also cases of young men between fifteen and twenty-five years of age. We have been able to find no case where the damages have been so grossly exaggerated as they have in the present case. (*Barclay v. Puget Sound Lumber Co.*, 48 Wash. 241, 16 L. R. A. (n. s.) 140, 93 Pac. 430; *Stiller v. Bohn Mfg. Co.*, 80 Minn. 1, 82 N. W. 981; *Ball v. Peterman Mfg. Co.*, 47 Wash. 653, 92 Pac. 425; *Gahagan v. Aermotor Co.*, 67 Minn. 252, 69 N. W. 914; *Louisville & N. R. Co. v. Law* (Ky. App.), 21 S. W. 648; *Gagnon v. Klaunder-Weldon Dyeing Mach. Co.*, 174 Fed. 477; *Rittel v. E. E. Souther Iron Co.*, 127 Mo. App. 463, 105 S. W. 662; *Barge v. Bousfield*, 65 Minn. 355, 68 N. W. 45.)

Choice of ways: It is unnecessary to review the authorities on the matter of the bearing of a choice of ways on the defense of contributory negligence, for the reason that the general rule has been twice affirmed by this court, and the district court itself, in its instructions numbered 19 and 20, instructed the jury in the language of that rule. We content ourselves with a reference to *Johnson v. Maiette*, 34 Mont. 477, 87 Pac. 447; *Zvanovich v. Gagnon & Co.*, 45 Mont. 180, 122 Pac. 272.

Mr. E. L. Bishop, for Respondent, submitted a brief and argued the cause orally.

Rule as to choice of ways, and its application: While this court has approved the general rule as to choice of ways laid down by the text-writers, it has not, nor, so far as I am able to discover, has any other court, held that it is negligence as a matter of law to adopt a way or method which it not so essentially dangerous that a reasonably prudent person would not have chosen it under all the circumstances, even though a safer way was available. To require plaintiff not only to exercise reasonable care in the selection, but to go further and from two or more ways approximately equally safe to select absolutely the safest, would be to require of him a far higher degree of care for his own safety than that required of a defendant. Apparently all the decisions are to the contrary. Indeed, the case

of *Killeen v. Barnes-King Development Co.*, 46 Mont. 212, 127 Pac. 89, seems to have settled this question adversely to appellants. (See, also, *Labatt on Master & Servant*, 3435; *Brinkmeier v. Missouri Pac. Ry. Co.*, 69 Kan. 738, 77 Pac. 586; *Great Northern R. Co. v. Thompson*, 199 Fed. 395, 47 L. R. A. (n. s.) 506, 118 C. C. A. 79; *Brown v. Hunt & Shuetz Co.* (Iowa), 145 N. W. 311; *Collins v. Chicago etc. Ry. Co.*, 150 Wis. 305, 136 N. W. 628; *George v. St. Louis etc. Ry. Co.*, 225 Mo. 364, 125 S. W. 196.)

Alleged error in refusing to recognize challenges: Statutes providing, like ours, that each party is entitled to a certain number of challenges are quite common, and it is uniformly held that where the defendants make a common defense and no issue is raised between them to be passed upon by the jury, the word "party" should be construed as including all of the defendants. (*Downey v. Finucane*, 205 N. Y. 251, 98 N. E. 391; *Illinois etc. Ry. Co. v. Freeman*, 210 Ill. 270, 71 N. E. 444; *Cumberland Telephone etc. Co. v. Ware*, 115 Ky. 581, 74 S. W. 289; *Witliff v. Spreen*, 51 Tex. Civ. 544, 112 S. W. 98; *Citizens' Ry. etc. Co. v. Johns*, 52 Tex. Civ. 489, 116 S. W. 62; *Galveston etc. Ry. Co. v. Saunders* (Tex. Civ.), 141 S. W. 829.)

Evidence of earning capacity: The contention of respondent that where a person has once acquired special knowledge and skill in a particular trade, by reason of which he is enabled to command greater compensation than a common laborer, that his ability to exercise such trade is an asset of which he cannot be wrongfully deprived without compensation, irrespective of the length of time he has been engaged in other pursuits, and that the wages which he could have earned in that particular trade at and subsequent to the time of his injury is competent evidence to be considered by a jury in estimating his damage, especially under our statute allowing compensation for all the detriment proximately caused, seems too obvious and just to need argument or authority to support it. The rule established in *Osterholm v. Boston & M. etc. Min. Co.*, 40 Mont. 508, 107 Pac. 499, is even broader than that contended for by respondent.

There is nothing in any of the cases cited by appellants that conflicts with respondent's contention, with the possible exception of the ancient case of *Hubbard v. Mason City*, 60 Iowa, 400, 14 N. W. 772, decided in 1883. That case, however, is clearly distinguishable in principle, since there the testimony adduced had reference not to wages paid to skilled mechanics but to common farm laborers, plaintiff not being engaged in that pursuit at the time of his injury. On the other hand, the case of *West Chicago St. R. Co. v. Maday*, 188 Ill. 308, 58 N. E. 933, cited by appellants, expressly holds that evidence as to plaintiff's skill and experience as a worker in wood was proper. In *Chicago etc. E. Ry. Co. v. Spence*, 213 Ill. 220, 104 Am. St. Rep. 213, 72 N. E. 796, cited by appellants, the evidence admitted was as to the salary received more than five years before. In *Hobel v. Mahoning etc. Ry. Co.*, 229 Pa. 507, 79 Atl. 119, the testimony admitted had reference to a salary received seven years before while employed in an entirely different capacity, and the court said that the testimony was too remote and the circumstances were very different. It is a matter of common knowledge that wages, salaries and other circumstances and conditions affecting the amount paid, even in the same line of employment, change from year to year, and the reasons for the rulings in the three last mentioned cases is obvious, but none of them is applicable to the case at bar, where the testimony related to wages at and subsequent to the time of the accident.

MR. JUSTICE SANNER delivered the opinion of the court.

The respondent, plaintiff below, brought this action to recover damages for injuries alleged to have been caused by the negligence of the Great Northern Railway Company and its switching crew, two of whom were joined with the company as defendants. The answer denies negligence on the part of defendants or any of them, and pleads contributory negligence as well as assumption of risk. Trial was to a jury who determined the issues against the defendants, and from the judgment entered on the verdict, as well as from an order denying their

motion for new trial, they have appealed. Several questions are presented which will be considered *seriatim*.

1. Upon the selection of the jury and after twelve men had been passed for cause, the appellants each demanded and sought to exercise four peremptory challenges. This was not permitted, the court ruling that they were only entitled to challenge collectively. As the result, there were left upon the jury, after all the peremptory challenges thus allowed had been exhausted, three persons who had been severally challenged by the appellants but upon whose rejection they did not agree. Their contention is that under section 6740, Revised Codes, each of them was entitled to exercise four peremptory challenges, and this is [1] claimed to be based upon the language of the statute as well as upon its history. The section reads as follows: "Each party may challenge the jury or jurors, as follows: 1. The panel or array. 2. For cause. 3. Peremptory. There can be only one challenge on a side to the array or panel, which may be made by one or more of the parties. A challenge to the array or panel may be made and the whole array or panel set aside by the court when the jury was not selected, drawn, summoned or notified, as prescribed by law. Challenges to individual jurors are for cause or peremptory. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff." It certainly cannot be said that this provision is unequivocal. If "party" means each individual upon either side of the cause, then a contradiction resides in the expressions "each party may challenge the array," but "there can be only one challenge on a side to the array." It is manifest, of course, that the use of the words "party" and "side" may have been studied and purposeful; but it is not manifest that the particular purpose was to allow four peremptory challenges to each individual defendant in every case. A case in which there is one plaintiff and two or more defendants, each exercising the same number of peremptory challenges, presents difficulties in the way of obeying

the mandate to challenge "alternately commencing with the plaintiff," and these difficulties are not to be needlessly multiplied. It is said that if the legislature intended to require defendants to join in their challenges, it could have said so in apt terms, such as appear in the provisions relating to criminal trials (sec. 9244, Rev. Codes). This is true. It is also true that if the statute had meant to authorize four peremptory challenges by each individual plaintiff or defendant, such intent could have found unmistakable expression. So, too, the fact that section 6740 first appeared in this state as section 1059, Code of Civil Procedure of 1895, supplanting a section of the Compiled Statutes (sec. 257, Code Civ. Proc.), which did expressly require parties on the same side to join in their challenges, is apparently of much significance. But this significance is more apparent than real. Words and phrases which have acquired a particular and appropriate meaning in law are to be construed according to such meaning (Rev. Codes, sec. 15). When section 6740 appeared for the first time in our Code, it was, and from an early date had been, universally held that the words "each party" used in the connection there presented, mean each side or each party litigant, and not each person of whom the respective sides or parties litigant are made up. (*Schmidt v. Chicago & N. W. Ry. Co.*, 83 Ill. 405; *Sodousky v. McGee*, 4 J. J. Marsh. (Ky.) 267; *Hargrave v. Vaughn*, 82 Tex. 347, 18 S. W. 695; *Bibb v. Reid*, 3 Ala. 88; *Snodgrass v. Hunt*, 15 Ind. 274; *Stone v. Segur et al.*, 11 Allen (Mass.), 568; *Bryan v. Harrison*, 76 N. C. 360; *Blackburn v. Hays*, 44 Tenn. 227; *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772.) So far as civil cases were concerned, special expression was required, not to state this meaning but its opposite; and in the absence of unequivocal language to the contrary, the persons composing each side or party litigant were required to join in the exercise of peremptory challenges. In criminal cases, and for very obvious reasons, the rule was exactly the reverse. Defendants jointly tried for a public offense were each presumed entitled to the number of peremptory challenges fixed by law, and an explicit

provision was necessary before they could be required to join; and this is the explanation of section 9244. Nor is the construction thus given to section 6740 without excellent reason. It is not to be supposed that a statute was intended to create an absurdity, and yet we have only to imagine the existence of several individual plaintiffs or defendants, each exercising four peremptory challenges, to see the possible result; instead of a speedy trial of the issues by an impartial jury, a long-drawn and expensive preliminary proceeding, resulting in the elimination of every talesman whose intelligence or freedom from bias might fairly commend him for the particular duty. As said by the supreme court of Illinois: "Had there been twenty tenants seeking damages, each holding by a separate lease, appellant's argument would lead to those tenants being permitted to exercise sixty challenges while the petitioner could use but three, and that, manifestly, would not accord with the intent of the statute." (*Freiberg v. South Side Elevated R. Co.*, 221 Ill. 508, 77 N. E. 920.) We need not doubt, however, that since nominal defendants who are in fact hostile to each other are "parties litigant," they are entitled to challenge as such within the meaning of section 6740. (*Hargrave v. Vaughn*, *supra*; *Rogers v. Armstrong Co.* (Tex. Civ.), 30 S. W. 848; *McLaughlin v. Carter*, 13 Tex. Civ. 694, 37 S. W. 666; *Hogsett v. Northern Texas Traction Co.*, 55 Tex. Civ. 72, 118 S. W. 807; *Levyn v. Koppin* (Mich.), 149 N. W. 993.) Whether such hostility must [2] appear on the face of the pleadings, or whether it may be shown in some other way at the time the jury is selected, we need not determine because no such hostility was ever made to appear in any way in the case at bar. The answer was joint, was signed by attorneys representing all the appellants and asserted defenses common to all of them. As between them there was not, by pleading, representation or evidence, any conflict of interest disclosed or any issue of any sort. They constituted but one party defendant, and the ruling by which they were limited to four peremptory challenges was correct.

2. At the close of respondent's evidence, appellants "jointly and severally" moved for a nonsuit, which was denied; later and at the close of all the evidence, they similarly moved for a directed verdict which met the same fate. Claiming error in these rulings, the appellants now insist that neither the respondent's case, in the first instance, nor the whole case, was sufficient in point of fact to warrant a recovery against them, or any of them. This involves a discussion of the circumstances of the accident, which were as follows:

The respondent was an employee of the Anaconda Copper Mining Company, at the B. & M. Smelter in Great Falls. One of the units composing that smelter was a structure called the "smoke-shed," a building several hundred feet long east and west, by twenty-seven feet wide north and south. This smoke-shed was open at both ends and was traversed lengthwise by two tracks, running on 16x16 timbers. Beneath these tracks, separated by similar timbers, were thirty-five bins which ran from side to side of the structure, each taking up about twelve feet of its length, and being about eighteen feet deep. Midway of the smoke-shed, or nearly so, was bin 17, which was flanked on the east by bin 18, and on the west by bin 16; west of bin 16 was bin 15, and east of bin 18 was bin 19; bin 19 was covered by a plank floor, the others being open so as to receive ore or rock from the cars; at the east end of bin 15 and next to bin 16, was a doorway to which a flight of stairs led; these stairs and doorway were installed for the purpose of enabling employees of the smelter, who might have occasion, to enter the smoke-shed at that point. The south rail of the south track as it crosses bins 15, 16, 17 and 18, was about fifty inches from the south wall of the building; between the two tracks and along the south wall were plank walks—also designed for the use of employees on occasion; the walk between the tracks was twenty-six inches wide; that along the south wall varies in width, being thirty-two inches wide over bins 15 and 16, and eighteen inches wide over bins 17 and 18. In the south wall, opposite bin 19, was an elevator-way, and from this a door led

to the floor covering that bin and giving access, when free from cars, to the plank walks above described. At a point 220 feet from the west end of the smoke-shed, a track called the "Black-Jack" left the north track and ran eastward just north of the smoke-shed. On November 28, 1912, the respondent was in charge of operations by which rock was forwarded from bin 17 through a conveyer into a crusher, there crushed and thence loaded into cars for transfer elsewhere. In the afternoon of that day, having partially loaded a car, he deemed it necessary to ascertain how much rock remained in the bin. For this purpose he proceeded to and up the stairway leading to the doorway at bin 15; arrived there he found a string of cars standing on the south track and extending east and west of the doorway; he paused a moment, listened and looked to the west to learn if there were any signs of movement in the cars or of an approaching engine; he saw no engine and heard nothing, though his sight and hearing were good; concluding that the easiest and safest way to accomplish his mission was to walk along the south wall to bin 17, he did so. About the middle of bin 17 he stopped, faced west, stooped over so as to see into the bin, and called to the man who was working there. As he did this, a crash of cars came; he was struck on the head and knocked into the bin, sustaining the injuries which will be hereafter described.

Upon the issue of appellant's negligence, the evidence on the part of respondent tended to show that the accident was caused by the movement of a switch-engine and cars from the west and into the cars standing on the south track, for the purpose of making a coupling; that for years it had been customary for employees of the smelter to be upon and about the tracks in the smoke-shed and to be about that portion thereof adjacent to bin 17 and adjacent to the door at bin 15, in the performance of their duties; that this was known to the railway company and its employees, and it was their rule and custom, before cars were moved or disturbed, to give warning both by ringing the bell and by the mouth of its employees; that it was also

their rule and custom in making a coupling to come to a full stop before completing the coupling, and thus to give warning that standing cars are about to be disturbed; that no warning whatever, either by ringing the engine bell or by the mouth of its employees, or by the usual method of procedure, was given of the operation which resulted in the injuries complained of; that had warning been given in any of these ways, the respondent could have put himself into a position of entire security and thus avoided the accident. So far as the railway company is concerned, we think this was sufficient. It is elementary that a [3] railway company must, in the operation of its engines and cars, exercise ordinary care to avoid injury to persons whose rightful presence upon or near its tracks is to be anticipated. (33 Cyc. 766.) This rule has special application to the present case, because the tracks were upon premises and within a structure belonging to respondent's employer.

On the part of appellants there was ample testimony to justify the conclusion that the coupling was managed in the ordinary way and that ample warning of the operation was given by [4] the almost constant ringing of the bell. As to the latter, it is vigorously insisted that the positive testimony of the members of the crew that the bell was ringing ought to be held to outweigh the negative evidence of respondent and his witness Wisler that they heard no bell; but the testimony of the respondent was that he listened for the bell and that from bins 15, 16 or 17 he has often heard, and could have heard, the bell of an engine in the smoke-shed or on the tracks west of the smoke-shed; the most that can be said upon this subject is that a substantial conflict was presented which it was the province of the jury to resolve. (*Riley v. Northern Pac. Ry. Co.*, 36 Mont. 545, 93 Pac. 948; *Walters v. Chicago etc. Ry. Co.*, 47 Mont. 501, 46 L. R. A. (n. s.) 702, 133 Pac. 357.)

But though the company was negligent and though such negligence came to exist through the fault of some person or persons [5] concerned in the operation that caused the accident, it does not follow that a case was made as against the appellants Welch

and Lynch. Besides them, three others took part, viz., the switch foreman, the engineer and the fireman. According to respondent's contention, the accident would not have occurred if the operation had been performed with due care, the want of such care consisting in the manner in which the coupling was made and in the failure to ring the bell or give any other warning; but there is nothing whatever to show that it was the duty or within the power of Welch or Lynch to control the manner of making the coupling, or to ring the bell or to give any warning. Counsel for the company observing this, insist that the verdict against Welch and Lynch "constitutes a special finding as against the railway company, and hence a reversal of that finding necessitates a reversal as to the railway company." The argument is that, as the jury "doubtless exonerated the other three members of the switching crew," the verdict against the company must have been based solely upon the negligence imputed to Welch and Lynch. This might be plausible had the respondent grounded his right to recover from the company solely upon the supposed negligence of Welch and Lynch, or had the verdict or finding as against any of the others been permissible. Such, however, was not the case; besides responsibility for the supposed fault of Welch and Lynch, the complaint charges the company with primary negligence, and also with responsibility for the failure of the entire switching crew; none of the other members of the crew were parties to the action, and no special findings of any kind were requested. It is therefore wholly gratuitous to say that the jury exonerated anybody; it might rather be inferred that the jury believed all the switching crew to have been negligent, and therefore returned their verdict against the company and the switchmen who were before the court. Under neither pleadings nor evidence was the negligence of the company dependent upon the particular members of the crew who were at fault; all of them could have been, though none of them need have been, joined as codefendants. Had all been joined, an erroneous exoneration of any of them would not have availed to discharge the company; an opposite mis-

take as to others would be equally ineffective. (*De Sandro v. Missoula Light & Water Co.*, 48 Mont. 226, 136 Pac. 711; *Melzner v. Raven Copper Co.*, 47 Mont. 351, 132 Pac. 552; *Verlinda v. Stone & Webster Eng. Co.*, 44 Mont. 223, 119 Pac. 573.)

The claim of contributory negligence is based upon a three-fold proposition: that the respondent, with a full knowledge and appreciation of the danger, without exercising any care for his own safety, and of his own deliberate choice, put himself into the peril from which he suffered. It is said that when he went to the door of bin 15, saw the standing cars and stopped, looked and listened, he demonstrated his appreciation of the danger. This is a singular reasoning, in view of the fact that he neither saw nor heard any indications of an approaching engine or any [6] movement in the cars. Appreciated danger has application under the doctrine of assumption of risk, and to defeat a recovery on this ground, the danger appreciated must be the one from which the injury arose. The evidence does not support—it negatives—the appreciation of any such danger. When the respondent saw the cars standing on the track, when by looking and listening he satisfied himself that no engine was near, and when he recalled the usual custom not to disturb standing cars without warning, he did assume whatever risk there might be in the cars moving of their own impulse or being moved in the usual way; but it was not apparent to him, nor was he bound to know, that without any warning and with unusual violence the cars he saw would be bumped by an engine and other cars. (*Moyse v. Northern Pac. Ry. Co.*, 41 Mont. 272, 108 Pac. 1062; *Westlake v. Keating Gold Min. Co.*, 48 Mont. 120, 136 Pac. 38.)

Nor, postponing the question of a choice of ways, is it apparent [7] that the respondent was lacking in care for his own safety. He was not upon an open railway, but upon his employer's premises, at a place entirely safe—so far as the particular danger in question is concerned—so long as switching was not going on. The cars were standing still, with no engine attached; they were harmless then and would continue harmless until they

were moved. As he entered the door of bin 15, he stopped, looked and listened; neither seeing nor hearing any sign of an engine or of movement among the cars, he proceeded to a point at bin 17 not to exceed twenty or twenty-five feet from the door; at bin 17 he faced west and hearing no warning, stooped to look into the bin and was struck. The whole thing could not have taken more than a minute or two; and this fact, with his precautions at the door and his right to expect a warning, are sufficient to prevent the conclusion that he was guilty of negligence as matter of law. (*Luebke v. Chicago, M. & St. P. Ry. Co.*, 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. 870; *Maguire v. Fitchburg R. R. Co.*, 146 Mass. 379, 15 N. E. 904; *Gatta v. Philadelphia B. & W. Ry. Co.*, 2 Boyce (Del.), 356, 80 Atl. 617; *Bain v. Northern Pac. Ry. Co.*, 120 Wis. 412, 98 N. W. 241.)

[8] Stress is laid upon certain statements which appellants' witnesses say the respondent made just after the accident, to the effect that it was due to his own carelessness. Of these he disclaims any recollection, pleading his distressed condition at the time. Such statements are, of course, potentially serious; but their value is not absolute. Whether they were made at all; whether, when made, the speaker was fully conscious of their purport; whether their purport is fairly to be taken as an admission of legal negligence or only an expression of the speaker's view after the event that he might have done or avoided something which ordinary prudence did not require, are all matters of which the jury must be the judge.

It is contended, however, that respondent was clearly guilty [9] of contributory negligence in his deliberate choice of a more dangerous way to ascertain the contents of bin 17, and that the verdict of the jury is contrary to the law as expressed in the court's instructions 19 and 20. These instructions state the rule recognized in *Johnson v. Malette*, 34 Mont. 477, 87 Pac. 447, and in *Killeen v. Barnes-King Dev. Co.*, 46 Mont. 212, 127 Pac. 89, that contributory negligence will be imputed as a matter of law to one who, having a duty to perform and a choice of ways to perform it, knowingly and voluntarily chooses the

way which is dangerous, to the way which is safe, or the way which is more dangerous to that which is less so. We shall not pause to consider whether, to ascertain the contents of bin 17, it was necessary for the respondent to go to that bin and see for himself, because his testimony that it was necessary is clear, is supported by substantial reasons, and is conformable to human experience; nor, save as bearing upon his choice of a point of observation, is the route taken by him of any importance, since he was not injured en route. The question of his choice of ways is, therefore, presented by the place and manner of observation selected by him. Two places were possible: the one he did choose, and another from the plank walk between the tracks. If the former was obviously dangerous under the circumstances, and the latter less so, then his choice was fatal unless justified by an emergency. We are not convinced that the point of observation selected by the respondent was obviously or necessarily dangerous in any respect now available to the appellants. It is true that in order to see into the bin at this point, he was required to stoop forward so as to be partially beneath the cars, and it is asserted, though not established, that in doing this he rested his hand upon the rail. Attention, however, has been called to the fact that the cars were standing, and, as such, harmless; that he exercised reasonable care to learn of the approach of an engine or of any sign or movement among the cars; that he was entitled to believe the cars would remain stationary, unless a warning should be given, in which event he could at once relieve himself of hazard from their movement. In the application of the rule upon choice of ways, and particularly in the imputation of knowledge that a given way is dangerous, regard is to be had to the circumstances; and these include the right of the chooser to assume that others whose unusual and negligent conduct alone can jeopardize him, will proceed in the customary manner and with reasonable care. (3 Labatt, Master & Servant, sec. 1271, pp. 3536-3548, and notes.) Assuming, however, that the way chosen by the respondent was dangerous, and that he knew or

ought to have known it to be so, we are not justified in the categorical holding that the alternative was any the less so. There is nothing to show that to see into bin 17 from the walk between the tracks, it would not have been necessary for him to act in about the same manner as he did on the south walk. The only advantages here were that the walk is more open and is the one commonly used for signaling by members of the switching crews. But these advantages were *nil*, in the absence of switching, and the respondent had no reason to expect that any switching operations were imminent. Moreover, ample and sufficient reasons are given, in our judgment, for the choice that was made. He had left his crusher running; an expeditious return to it was necessary; to reach the plank walk between the tracks a long detour around the cars to the west or to the east was necessary; either detour possessed dangers peculiar to itself; the elevator which gave access to the floor over bin 19 was not in commission, and cars were standing upon that [10] floor. In balancing ways for the purpose of making a choice between them, the rule does not require a choice unerring in the light of after-events, but only such a choice as under all the known or obvious circumstances a reasonably prudent person might make. (*Killeen v. Barnes-King Dev. Co.*, *supra*; *Collins v. Chicago & N. W. Ry. Co.*, 150 Wis. 305, 136 N. W. 628; *Great Northern Ry. Co. v. Thompson*, 199 Fed. 395, 47 L. R. A. (n. s.) 506, 118 C. C. A. 79.) Whether under all the circumstances such a choice was made by the respondent, was properly submitted to the jury, and their verdict was in no sense contrary to the instructions upon this subject.

3. The respondent had testified that he is a carpenter and was totally incapacitated from following that trade by his [11] injuries; and the court, over objection, allowed testimony as to the going wage at Great Falls for carpenters, which was \$1.75 per day more than the respondent was receiving at the smelter. Fault is found with this, the contention being that, so far as earning capacity is concerned, the respondent was limited to his then occupation as a standard. This is not cor-

rect as an absolute proposition, though there are cases in which the prior occupation has been held too remote, on account of the nature of such occupation, the time since which it was followed, or the circumstances of its abandonment. A precedent for the ruling assailed may be found in *Osterholm v. Boston & Mont. C. C. & S. Min. Co.*, 40 Mont. 508, 521, 107 Pac. 499, wherein it was said: "While plaintiff was on the stand, he testified: 'I was working here for \$3.50, \$3.75, \$4 and \$4.50. I have followed contracting.' He was asked: 'What did you make contracting?' Over objection he answered: 'I was always making six and always over and sometimes under.' We think the testimony was competent as bearing upon his earning capacity."

Complaint is also made of the giving of instruction No. 22, in that it authorized the jury not only to consider the impairment [12] of respondent's earning capacity, but also his "disability by reason of the injury to pursue his usual vocation, if you find he is so disabled." It is suggested that this is wrong in the abstract, inapplicable to the case and prejudicial in view of the ruling just referred to. The evidence, however, tended to show that respondent is unable, because of his injuries, to do the work which at the time of the injuries he had been doing, or to pursue the established course of his life as a sound individual able to turn his hand to many things and thus to depend upon constant employment. That the loss of earning capacity is one element of damage, and disability to pursue one's usual vocation is another, were settled in *Montague v. Hanson*, 38 Mont. 376, 386, 99 Pac. 1063.

After the respondent had been cross-examined touching his reasons for going to bin 17 and attempting to look into the same, he was allowed to explain on redirect examination, why he did not regard the inexperienced man who was stationed there, as capable of giving the information of which he was in quest. This is criticised as calling for the conclusion of the witness as to the possibilities of the English language; but we do not see reversible error in it, nor in the only other ruling complained of, viz., the refusal of the offer to explain the absence of Lynch.

4. It is contended that the award is so excessive as to evince [13] passion and prejudice. At the time of his injuries respondent was in charge of the crusher, with two assistants, and was earning \$3.25 per day. He was sober, alert and industrious, but the record leaves us uncertain as to his age. His injuries consisted of a couple of scalp wounds, not very serious; the loss of the first two fingers of his right hand, and the crushing of the third, so that he cannot close his hand and has no grip in it; a fracture of the metacarpal bone of the thumb of the left hand, which required an operation; there is also a growth coming inside of his left hand since the accident; necessarily he suffered pain and he has sustained a permanent mutilation. For at least four months he was unable to do any work, and he cannot now and never will be able to do the work he was doing. He is doing other work at the same wage but has lost his capacity as an all-around man, so that he must take whatever he can do, and when nothing is offered that he can do, he must lay off. He is a carpenter by trade but his injuries have deprived him of that reserve against the day of need. How, in a summation of all these things, it is possible to say that an award of \$5,000 is so grossly excessive as to shock the conscience and understanding, we are at a loss to perceive. Many decisions from other states are cited to show that similar or lesser injuries do not warrant such an award; some of these are well considered; others seem to ignore pain, mutilation and disability to pursue one's established course of life, as elements of damage. We are satisfied with our own standard and, under it, see no compelling reason for interference with the verdict. (*Lewis v. Northern Pac. Ry. Co.*, 36 Mont. 207, 92 Pac. 469; *White v. Chicago, M. & St. P. Ry. Co.*, 49 Mont. 419, 143 Pac. 561; *Knuckey v. Butte Electric Ry. Co.*, 45 Mont. 106, 122 Pac. 280; *Forquer v. North*, 42 Mont. 272, 112 Pac. 439.)

The judgment and order appealed from are reversed so far as the appellants Welch and Lynch are concerned, respondent to pay their costs on appeal; as to the appellant railway com-

pany the judgment and order appealed from are affirmed at its cost.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
CONCUR.

STATE EX REL. CARROLL, RELATOR, v. DISTRICT COURT
ET AL., RESPONDENTS.

(No. 3,632.)

(Submitted February 17, 1915. Decided March 22, 1915.)

[147 Pac. 612.]

Supervisory Control—Scope of Writ—District Courts—Departments—Jurisdiction—Habeas Corpus—Incompetent Persons—“Mentally Incompetent”—Definition.

Habeas Corpus—Scope of Writ.

1. *Quære*: Has the district court jurisdiction, in *habeas corpus* proceedings, to discharge from custody one held under guardianship as an incompetent person?

Supervising Control—Scope of Writ.

2. The writ of supervisory control issues only to correct rulings made by the district court acting within jurisdiction, where there is not an appeal or the remedy by appeal cannot afford adequate relief, and gross injustice is threatened as the result of such rulings.

District Courts—Departments—Jurisdiction.

3. The departments into which a district court may be divided are co-ordinate, neither possessing any appellate or supervisory control over the other.

Same.

4. Where restoration of an incompetent person to capacity had been denied by one department of a district court, it was improper for another department of the same court on *habeas corpus*, within two weeks thereafter and upon substantially the same state of facts, to order the discharge of such person from the custody of her guardian.

Incompetents—Guardians—Powers.

5. One having the guardianship of the estate of an incompetent must, under the Code provisions applicable, of necessity also be guardian of his person.

Same—“Mentally Incompetent”—Definition.

6. *Held*, that the words “mentally incompetent,” as used in section 7764, Revised Codes, mean a person who, though not insane, is, by reason of old age, disease, weakness of mind or from any other cause, unable, without assistance, to properly manage and take care of himself and his property.

[As to right to control action as between two courts of concurrent jurisdiction, see note in Ann. Cas. 1912A, 150. As to common-law powers of guardians, see note in 89 Am. St. Rep. 257.]

Original application for writ of supervisory control by the State, on the relation of Joseph J. Carroll, as guardian of Mary Murphy, an incompetent person, against the District Court of the First Judicial District in and for the County of Lewis and Clark and J. M. Clements, a judge thereof. Order annulled.

Messrs. Galen & Mettler, for Relator, submitted a brief, and argued the cause orally.

Mr. Wellington D. Rankin, for Respondents, submitted a brief, and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

By an order made and entered in department No. 2 of the district court of Lewis and Clark county, in June, 1912, Joseph J. Carroll was duly appointed guardian of the person and estate of Mary Murphy, an incompetent person. He immediately qualified and has since been in the active discharge of his duties. In January, 1915, Anna E. Nett, a daughter of Mrs. Murphy, petitioned the court to have her mother restored to capacity. A hearing was had in department No. 2, presided over by Hon. J. Miller Smith, with the result that the petition was denied; the court finding Mary Murphy still incompetent and incapable of caring for herself or her property. On January 18, Mrs. Nett applied to the court in department No. 1, before Hon. J. M. Clements, for the release of Mrs. Murphy on *habeas corpus* proceedings, alleging that she was illegally restrained of her liberty by Joseph J. Carroll, under the pretense that Mrs. Murphy is incompetent, whereas, it is alleged, she is competent and capable of caring for herself and her property. The writ was issued, and at the return time the guardian, in person and by counsel, represented that a formal return had not been prepared for lack of time and opportunity, whereupon by common consent the hearing proceeded upon the understanding that the return would seek to justify the guardian's action by reason of the guardianship. At the conclusion of the hearing the court

made an order for the temporary custody of Mrs. Murphy pending final determination of the matter. In making the order, it appeared that the court acted within jurisdiction, and we declined to interfere upon *certiorari* proceedings. Upon February 5, 1915, the court made and entered its final order, wherein are recited at great length the facts which the court deemed supported by the evidence. The conclusion, which is the formal part of the order, reads as follows: "It is ordered that the prayer of the petitioner be granted, and that the person of Mary Murphy be released from the control and care of J. J. Carroll, and that she be permitted to go hence, whither she will, and that the expense of her living, such as she may see fit to enjoy, be a charge against her estate." The guardian then made this application for relief. An order *nisi* was issued, and upon the return the matter was argued and submitted upon a motion to quash.

We shall not stop to inquire whether the district court possesses the jurisdiction or authority, in *habeas corpus* proceedings, to discharge from custody one held under guardianship as an incompetent person. We shall assume that authority to do so, in a proper case, is lodged in that court. The writ of [2] supervisory control is issued only to correct rulings made by the lower court acting within jurisdiction, but erroneously, where there is not an appeal, or the remedy by appeal cannot afford adequate relief, and gross injustice is threatened as the result of such rulings. (*In re Weston*, 28 Mont. 207, 72 Pac. 512.)

In our opinion, the order now under review should not have been made for several reasons:

1. The district court in department No. 2, on January 15, 1915, after a hearing had for the express purpose of determining whether Mrs. Murphy was so far competent as to be able to care for herself and her property, decided that she was not, and that a guardian is still necessary. That adjudication should have [3] ended the matter, except for causes arising subsequently thereto. The two departments of the district court are co-

ordinate. Neither possesses any appellate or supervisory control over the other, and when one has spoken upon a matter properly before it, a due sense of propriety alone ought to be sufficient to stay interference by the other.

2. When the application for restoration was denied in department No. 2, Mrs. Nett was forbidden by statute (section 6324, Rev. Codes) the right to renew it before the other department, and yet, if this order now under review be permitted to stand, she will have accomplished by indirection the very thing she is forbidden to do directly. This also ought to have been sufficient justification for the court in department No. 1 denying the relief sought. The statutes are intended to be obeyed in spirit as well as in letter. The evidence taken in department No. 1 was not so different from that considered in department No. 2 as to warrant a different conclusion.

3. In the beginning of the hearing in department No. 1, upon an objection by counsel for the guardian, the court in ruling said:

"Of course, I cannot inquire into the legality of his authority as guardian; but I do not know what the petitioner expects to show here in support of this petition. It can only go that far, whether or not, as guardian of her person, he has gone so far with it as to amount to such detention as to deprive Mrs. Murphy of her personal liberty. * * * I will overrule the objection at the present, and will hear only the question as to whether or not the guardian has exceeded his authority as prescribed in the Code." This declared intention to limit the investigation to a matter which would have been a perfectly proper subject of inquiry by a court having it regularly under consideration was apparently abandoned altogether, and the investigation made to compass the entire subject of the propriety or necessity of a guardian for Mrs. Murphy. Taken in connection with the order itself, these considerations disclose an arbitrary and unwarranted exercise of power, the result of which, if unchallenged, will involve the guardian in legal difficulties of the most serious character.

4. While the order does not in terms discharge this relator as guardian of the person of Mary Murphy, it was evidently intended to do so in fact; for the enforcement of the order is absolutely incompatible with the discharge of the guardian's duties to his ward. Section 7766, Revised Codes, provides that every guardian appointed for an incompetent person "has the care and custody of the person of his ward, and the management of all his estate, until such guardian is legally discharged." This relator is still guardian of the person of Mary Murphy—nominally so, at least—charged by statute and the obligation of his bond to have her care and custody, and yet forbidden by this order, under the penalties which might be imposed in contempt proceedings, to exercise either care or custody of the person of [5] his ward. The court must have fallen into error in assuming that it is possible under our Codes to have a guardianship of the estate of an incompetent person without a guardianship of the person. While the person and estate of a minor are independent in guardianship matters, and the court may appoint a guardian for either the person or estate, or for both (section 7753), no such authority exists with respect to an incompetent person, and for the most obvious reason. Before a guardian can be appointed for an incompetent, the district court to which the application is addressed must, after a full hearing and examination, determine "that the person in question is incapable of taking care of himself and managing his property." (Section 7765.) It goes without saying that, if Mrs. Murphy is not an incompetent person, she should not be under guardianship at all; for there is not any other ground for interference by the court with her or her affairs. If she is incompetent, the necessity for a guardian of her person is equally as great as the necessity for a guardian of her estate. The order which in effect discharges the relator as guardian of the person of Mary Murphy, while leaving him guardian of her estate, is altogether unwarranted.

5. In the preamble to the order now under review, the court, in considering the circumstance that Mrs. Murphy is about 80 years old, said: "Even if this old lady's mental horizon was partially or

totally clouded, so long as she is not a maniac, an idiot, or insane, no reason exists why she should be deprived of the widest opportunity to enjoy all the blessings of this short life within her grasp and appreciation." If by this declaration it was meant that a guardian can be appointed only for an infant, a maniac, [6] an idiot or an insane person, the court was in error. Section 7764 deals with the guardianship of an insane person or a person who is mentally incompetent to manage his property. None of the terms "maniac," "idiot" or "insane" can be used interchangeably with "mentally incompetent." While a maniac, an idiot or an insane person is a mentally incompetent person, the reverse is not true at all. A person may be mentally incompetent within the meaning of sections 7764-7767, and yet be neither a maniac, an idiot, or an insane person. Section 4000, Compiled Laws of Utah of 1907, and section 1763, Code of Civil Procedure of California of 1897 are practically identical with our section 7764 above. Out of abundance of caution, the Utah and California statutes define "mentally incompetent" as follows: "The phrases 'incompetent,' 'mentally incompetent,' and 'incapable,' as used in this title, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons." (Sec. 4001, Utah Comp. Laws; sec; 1767, Cal. Code Civ. Proc.) In our judgment, these statutes correctly define "mentally incompetent," as used in our Code. (Sec. 7764, above; *In re Daniels*, 140 Cal. 335, 73 Pac. 1053; *Estate of Leonard*, 95 Mich. 295, 54 N. W. 1082; *Hayes v. Candee*, 75 Conn. 131, 52 Atl. 826.)

The motion to quash is overruled. The order of the district court, made and entered in the *habeas corpus* proceeding on February 5, 1915, is annulled.

Order annulled.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE ~~EX~~ REL. DARLING, RELATOR, v. BOARD OF COUNTY COMMISSIONERS, RESPONDENT.

(No. 3,634.)

(Submitted February 20, 1915. Decided March 22, 1915.)

[148 Pac. 314.]

Mandamus—Dismissal—Moot Case.

1. Where, after the institution of a *mandamus* proceeding in the supreme court, the Act under which it was sought to compel a board of county commissioners to do certain things toward the creation of a new county, was repealed, the proceeding ordered dismissed.

Original application by the State, on the relation of M. S. Darling, for writ of mandate running to the board of county commissioners of Teton County. Proceeding dismissed.

Messrs. Freeman & Thelen and *Mr. Wm. T. Pigott*, for Relator.

Mr. T. H. Pridham, for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Petitions in due form having been presented to the board of county commissioners of Teton county, praying for the creation of a new county from portions of Teton and Chouteau counties and to be known as Pondera county, the board gave the required notice and fixed a time for hearing. At the hearing two withdrawal or counter petitions were presented, one for the exclusion of nine townships in a body, and the other known in the record as exhibit 28 for the exclusion of about six and one-half sections. Each of these counter-petitions was granted. By excluding the territory embraced in exhibit 28, the proposed new county was divided into two noncontiguous parts. The board thereupon denied the petition for the creation of the new county, and this proceeding was instituted to compel it to re-assemble, determine the boundaries of the proposed new county, including therein the territory embraced in exhibit 28, and to

proceed as required by sections 2-6, Chapter 133, Laws of 1913. An alternative writ of mandate was issued, and upon the return the respondent board interposed a demurrer and motion to quash, and the matter was submitted.

Since this proceeding was instituted the statute under which it was sought to create Pondera county has been repealed. The demurrer and motion are sustained and the proceeding is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

STATE EX REL. WORKING ET AL., RELATORS, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,640.)

(Submitted March 8, 1915. Decided March 22, 1915.)

[147 Pac. 614.]

Default Judgments—Setting Aside—Denial of Motion—Rehearing—Power of Court—Disqualification of District Judges—Effect of Affidavit—Excess of Jurisdiction—Certiorari.

Default Judgments—Setting Aside—Rehearing—Effect of Order.

1. The effect of an order granting leave to renew a motion, on a day fixed, to vacate a default, was to annul the order theretofore made denying the motion, and to set it for hearing on its merits the same as if it had not been heard before.

Same—Motions—Rehearing—Power of Court.

2. The district court has power to grant a rehearing upon a motion to open a default when additional facts are presented or defects in the proof are supplied, or even upon the same state of facts, and its ruling will not be disturbed except in case of abuse of discretion.

Same—Renewal of Motion—Practice.

3. While it is the better practice to have the order denying a motion to vacate a default recite that it is made without prejudice or that permission is granted to renew the motion, yet where neither course is pursued and the renewed motion has been heard and disposed of upon its merits, it will be presumed that leave was previously granted.

Same—Disqualification of District Judges—Right of Defendant.

4. A defendant, though in default, is still a "party," so far at least as to entitle him to move to set it aside (or to take and prosecute an appeal), and as such may, by filing the affidavit prescribed by section 6315, Revised Codes, as amended (Laws 1909, Chap. 114), disqualify

the district judge, who, after denying the motion to vacate, had granted a rehearing.

Same—Disqualification of Judges—Excess of Jurisdiction—*Certiorari*.

5. *Held*, on *certiorari*, that after a disqualifying affidavit had been filed against a district judge under the provisions of section 6315, Revised Codes, as amended, he was deprived of further jurisdiction in the matter of hearing a renewed motion to set aside a default, and exceeded his authority in vacating the order granting a rehearing thereof, the reason or reasons which prompted his action being immaterial.

[As to validity of judgment rendered by disqualified judge, see note in 84 Am. Dec. 126. As to waiver of objection to disqualified judge, see note in Ann. Cas. 1912A, 1072.]

Original application for writ of *certiorari* by the State, on the relation of Lincoln Working and others, against the District Court of the First Judicial District in and for the County of Lewis and Clark and James M. Clements, as judge thereof. Motion to quash overruled and order annulled.

Mr. E. D. Weed and *Mr. Edward Horsky*, for Relators, submitted a brief; *Mr. Horsky* argued the cause orally.

Mr. Ed. Phelan and *Mr. J. H. Brass*, for Respondents, submitted a brief; *Mr. Phelan* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Certiorari. In an action pending in the district court of Lewis and Clark county, entitled "*Frank Ernst v. Lincoln Working et al.*," the relators herein, the defendants suffered default for failing to answer after their demurrer to the complaint had been overruled. Default was entered on January 16, 1915. They thereafter moved the court to set aside the default. This motion was denied on February 8. The court thereupon appointed March 1 for a hearing upon the question of the amount of damages plaintiff was entitled to recover. On February 25, upon application of defendants, the court made an order granting them leave to renew their motion to set aside the default. Hearing upon the motion was set for February 27, the court making an order shortening the time for the giving of notice. At the time this order was made the defendants exhibited to

the court, Hon. J. M. Clements presiding, the affidavits which they intended to file setting forth the grounds of their motion, to which was attached their proposed answer, duly verified. Thereafter these, together with the motion, were filed with the clerk. During the afternoon of the same day the defendants filed an affidavit alleging that Judge Clements was disqualified by reason of his bias and prejudice to hear the motion or to hear the cause. Later in the afternoon, and after the affidavit had been called to his attention. Judge Clements revoked the order granting leave to renew the motion. Thereupon this proceeding was brought to have the order of revocation annulled as in excess of jurisdiction.

At the hearing, counsel for defendants herein interposed a motion to quash the writ and dismiss the proceeding on several grounds, which together present the single question whether, [1] upon the facts recited above, the relators are entitled to relief. The legal effect of the order granting leave to renew the motion was not, as counsel seem to think, merely to give the relators the opportunity to appear in court on February 27 and disclose their reasons why the rehearing should be had, but to annul the order of February 8 denying the motion to vacate the default and to set the hearing upon the motion. It reinstated the motion for hearing on its merits, just as if the order denying it had never been made. The office of the order was the same as an order by this court granting a rehearing upon petition under the rule (44 Mont. xxxvi, 123 Pac. xiii, par. 13) after a cause has been heard and determined. When such a rehearing is granted, the cause stands open as if it had never been heard, unless the order limits the scope of the argument or designates the particular point or points upon which further argument is desired. That a trial court has the power to grant a [2] rehearing upon a motion, we do not think is open to question. A decision upon the motion has not the force of a former adjudication, in the same sense as a judgment finally settling the controversy. When a final judgment has once been rendered, it cannot be set aside by the court which has rendered it,

except upon motion for a new trial or some other method authorized by statute, and, unless void upon its face, it is conclusive as to the matter adjudged upon the parties and their successors. (Rev. Codes, sec. 7914.) A decision upon a motion, so long as it stands, is conclusive in subsequent controversies when it has adjudicated some substantial right, especially if it is made upon a full hearing of controverted facts, and may be reviewed by appeal. (*Riggs v. Pursell*, 74 N. Y. 370.) The power of review, by the court making it, is not often limited by statute, and it is generally held that it is within the discretion of the court to reconsider its decision on a motion when additional facts are presented, or defects in the proof are supplied, or even upon the same state of facts, though in the latter case the power is rarely exercised. (*Riggs v. Pursell*, *supra*.) In *Kenney v. Kelleher*, 63 Cal. 442, it was said: "Leave to renew a motion (to vacate a default) may be given after the original motion is denied, and the granting * * * of leave is within the legal discretion of the court, and will not be interfered with except in case of abuse; and it is not an abuse to grant leave upon the same facts more fully stated." The following cases support the rule thus stated: *Hitchcock v. McElrath*, 69 Cal. 634, 11 Pac. 487; *Adams v. Lockwood*, 30 Kan. 373, 2 Pac. 626; *Carlson v. Carlson*, 49 Minn. 555, 52 N. W. 214, *Stacey v. Stephen*, 78 Minn. 480, 81 N. W. 391; *Stutzner v. Printz*, 43 Neb. 306, 61 N. W. 620; *Riggs v. Pursell*, 74 N. Y. 370; *Fisk v. Hicks*, 29 S. D. 399, Ann. Cas. 1914D, 971, 137 N. W. 424; *Clein v. Wandschneider*, 14 Wash. 257, 44 Pac. 272. See generally, also, 28 Cyc. 20.

The discussion of the subject in *Jensen v. Barbour*, 12 Mont. 566, 31 Pac. 592, though not decisive, is a direct recognition of the rule as stated in *Belmont v. Erie Ry. Co.*, 52 Barb. (N. Y.) 637, therein cited, which is in full accord with *Kenney v. Kelleher*, *supra*. While it is the better practice to have the order on the original motion recite that it is made without prejudice, or that permission is granted to renew the motion, it will be found by an examination of the cases cited that, though this has not been done, and though formal leave has not been granted,

nevertheless, if the renewed motion has been heard and disposed of upon its merits, the presumption attaches that leave was previously granted. (*Harris v. Brown*, 93 N. Y. 390.)

While the motion stood for hearing, did the relators have the [4] right, under the statute (Rev. Codes, sec. 6315; Laws 1909, Chap. 114), to file the disqualifying affidavit? It is not necessary to consider whether a defendant who is in default is a "party" within the meaning of the statute. It may be conceded that by suffering default a party ceases thereafter to be a "party" for most purposes, and that he has no standing in court except to move for relief from the default or to take and prosecute an appeal. For the purpose of a motion in this behalf, however, he is a party and *pro hac vice* has all the rights of a party. Under the statute, a party has the right to challenge the presiding judge by imputing to him bias and prejudice, and thus deprive him of the power to hear and determine the "action, motion or proceeding," whatever it is, provided only he exercises his privilege as therein prescribed. The word "motion," as there used, was considered by this court in *State ex rel. Carleton v. District Court*, 33 Mont. 138, 8 Ann. Cas. 752, 82 Pac. 789, and was held to include every motion which may be made in a case, except such as may be made during the progress of a hearing; these latter being necessarily excluded, because it was evidently not the purpose of the legislature to permit the interruption of a hearing during its progress, but to require the party to exercise his privilege before the time set for the hearing. The relators were clearly within their rights as defined in this case. Upon the filing of the affidavit, Judge Clements was divested of all power to act with relation to the renewed motion, except as permitted by the statute. In *State ex rel. Carleton v. District Court, supra*, it was said of this provision: "Of the wisdom of its [the legislature's] action there may be much doubt or question; but it must not be overlooked that this ground of disqualification stands upon the same level of importance as do the others enumerated, except as to the time when the imputation may be

made, and operates just as effectively, if invoked at the proper time."

It is not necessary to inquire why Judge Clements vacated the [5] order granting the rehearing. Whether he did it because he was of the opinion that it had been improvidently granted, or because the order denying the original motion was not made without prejudice, or did not grant relators leave to renew it, is not now of importance. When the affidavit was called to his attention, he was deprived of jurisdiction to do anything affecting the merits of the pending motion.

Counsel for defendants cite section 6324 of the Revised Codes as conclusive against the right of relators to relief. It has no application. It goes no further than to prohibit a party who has already applied to one judge, who has refused to grant an order in whole or in part, or has granted it conditionally, from applying to another for the same order, save in the exceptional cases therein specifically named. It cannot have, and evidently was not intended to have, application to any motion or proceeding pending for hearing. This case is illustrative of the abuses to which the statute is susceptible. Upon their face, the proceedings in the district court suggest sharp practice by the relators. That it is susceptible of such abuse is not, however, a reason why litigants should be denied any right conferred by it. This is a matter which should be remedied by the legislature, and not this court.

The motion to quash is overruled, and the order complained of is annulled.

Order annulled.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

STATE EX REL. WORKING ET AL., RELATORS, v. DISTRICT
COURT ET AL., RESPONDENTS.

(No. 3,641.)

(Submitted March 8, 1915. Decided March 22, 1915.)

[147 Pac. 616.]

[For syllabus, see *State ex rel. Working et al. v. District Court et al.*, ante, p. 435.]

Original application for writ of *certiorari* by the State, on the relation of Lincoln Working and others, against the District Court of the First Judicial District in and for the County of Lewis and Clark and James M. Clements, a judge thereof.

Mr. E. D. Weed and *Mr. Edward Horsky*, for Relators.

Mr. Ed. Phelan and *Mr. J. H. Brass*, for Respondents.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The order against which relief is sought in this case was made in a cause pending in the district court of Lewis and Clark county, entitled "*Gustava Ernst v. Lincoln Working et al.*," the relators. The decision in case numbered 3640, under the same title as this (*ante*, p. 435, 147 Pac. 614), is conclusive of this; the record of the proceedings in both being identical. Upon the authority of that case, the motion to quash the writ in this case is overruled, and the order is annulled.

Order annulled.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

COLUMBUS STATE BANK, RESPONDENT, v. ERB ET AL.,
DEFENDANTS; ANDERSON ET AL., APPELLANTS.

(No. 3,488.)

(Submitted February 15, 1915. Decided March 29, 1915.)

[147 Pac. 617.]

*Promissory Notes—Impairing Mortgage Security—Estoppel—
Appeal and Error—Theory of Case—Evidence—Market Value.*

Appeal and Error—Theory of Case.

1. Where a party permits, without objection, the trial of a cause to proceed upon a certain theory, he may not, on appeal, assert that a different theory should have been adopted.

Evidence—Hearsay.

2. A copy of a copy of items of sales of livestock, made in a pocket memorandum-book which, as well as the first copy, had been lost, was hearsay and properly excluded.

Same—Market Value.

3. While the original cost price of an article, as well as the amount it brought at sheriff's sale, is some evidence of its market value, neither is conclusive.

Same.

4. Where no evidence was introduced on the question of the reasonable market value of machinery, either at the time plaintiff obtained it from the buyer or at the time it was sold, the original cost of which was \$1,300 and which was sold at sheriff's sale for \$330, neither the referee nor the court in adopting his finding was guilty of abuse of discretion in fixing its value at the latter sum.

Promissory Notes—Impairing Mortgage Security—Estoppel.

5. Where indorsers on a note knew of, and impliedly gave their assent to, sales of livestock mortgaged to secure it, they were estopped to insist that the mortgagee, by permitting the mortgagor to make the sales, had impaired the mortgage security and that they had been injured by the mortgagor's mismanagement and misappropriation of the proceeds.

Appeal from District Court, Yellowstone County; Geo. W. Pierson, Judge.

ACTION by the Columbus State Bank against Guy D. Erb and others. From a judgment for plaintiff and an order denying them a new trial, certain of the defendants appeal. *Affirmed.*

Messrs. Johnston & Coleman, for Appellants, submitted a brief; *Mr. Wm. Johnston* argued the cause orally.

The authorities are agreed on the question as to the admissibility of a correct copy of a lost record which would have been

admissible if not lost. Elliott on Evidence, section 470, states the rule as follows: "Copies or transcripts taken from a party's books of original entry are admissible on proof of the loss or destruction of the books." (17 Cyc. 518e; 3 Ency. of Evidence, 542, 543; *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565.) "Where the books of original entry have been destroyed by fire, the balance claimed to be due on an account may be shown by a ledger in which such balance was entered by a clerk who is beyond the jurisdiction of the court and whose residence is unknown to plaintiff." (*Rigby v. Logan*, 45 S. C. 651, 24 S. E. 56; *McDonnell v. Ford*, 87 Mich. 198, 49 N. W. 545; *McCrary v. Jones*, 36 S. C. 136, 15 S. E. 430; *Stephan v. Metzger*, 95 Mo. App. 609, 69 S. W. 625; *South Omaha v. Wrzesinski*, 66 Neb. 790, 92 N. W. 1045; *Manchester Assur. Co. v. Oregon Ry. Co.*, 46 Or. 162, 114 Am. St. Rep. 863, 69 L. R. A. 475, 79 Pac. 60; *State v. City of Pierre*, 15 S. D. 559, 90 N. W. 1047; *Cowan v. Hatcher* (Tenn.), 48 S. W. 328.) It is even held with great uniformity a copy of a lost copy of the lost record is admissible in evidence. (Elliott on Evidence, sec. 1483; *Winn v. Patterson*, 9 Pet. (U. S.) 663-677, 9 L. Ed. 266; *Kelly v. Cargill Elevator Co.*, 7 N. D. 343, 75 N. W. 264; *Joslyn v. Pulver*, 59 Hun, 129, 13 N. Y. Supp. 311; *Smith v. Lindsey*, 89 Mo. 76, 1 S. W. 88; *Chambers v. Haney*, 45 La. Ann. 447, 12 South. 621; *Hamer v. State*, 60 Tex. Cr. 341, 131 S. W. 813; *Nash v. Williams* (Cornett v. Williams), 20 Wall. (U. S.) 226, 22 L. Ed. 254; *New York N. H. & H. R. Co. v. Horgan*, 26 R. I. 448, 59 Atl. 310; *Mansfield v. Johnson*, 51 Fla. 239, 120 Am. St. Rep. 159, 40 South. 196; 17 Cyc. 517; Wigmore on Evidence, 1275 (c).)

Where a creditor is secured by a chattel mortgage and by sureties on the same debt, any act of the creditor which tends to lessen the value of the security operates to release the sureties to that extent. So if the act of the respondent in retaining the shearing plant for eighteen months before sale tended to lessen the value of the plant, the sureties should be released to that extent. (7 Cyc. 81; *Miller v. McElwain*, 52 Kan. 91, 34 Pac. 396; *Murray v. Loushman*, 47 Neb. 256, 66 N. W. 413; *Howery*

v. *Hoover*, 97 Iowa, 581, 66 N. W. 772; *Nichols-Shepard & Co. v. Burch*, 128 Ind. 324, 27 N. E. 737; *New England Mut. Life Ins. Co. v. Randall*, 42 La. Ann. 260, 7 South. 679; *Barrett v. Bass*, 105 Ga. 421, 31 S. E. 435.)

The respondent bank is liable for the proceeds derived from the sale of the mortgaged property which were paid into the bank, and the sureties on the note secured by the mortgage in question are entitled to credit for all such proceeds. Under the authorities it was immaterial whether the sureties requested the bank to so apply said proceeds. The law imposed this duty upon the bank without waiting for any request from the sureties. (*Montgomery v. Martin*, 94 Ga. 219, 21 S. E. 513; *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613; *De Goey v. Van Wyk*, 97 Iowa, 491, 66 N. W. 787; *Keel v. Levy*, 19 Or. 450, 24 Pac. 253; *Embree v. Strickland*, 1 White & W. Civil Cas. Ct. App. (Tex.) 1299; *Kuhns v. Westmoreland Bank*, 2 Watts (Pa.), 136; *Holli-day v. Brown*, 33 Neb. 657, 50 N. W. 1042; *Mellendy v. Austin*, 69 Ill. 15; 32 Cyc. 221.)

Mr. M. Brown and *Messrs. Nichols & Wilson*, for Respondent, submitted a brief; *Mr. C. W. Nichols* argued the cause orally.

Hearsay evidence may be written as well as oral. It is that evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also in part on the veracity and competency of some other person. It is uniformly held incompetent. (*Elliott on Evidence*, 314; 5 *Greenleaf on Evidence*, 99; *Hopt v. Utah*, 110 U. S. 574, 28 L. Ed. 262, 4 Sup. Ct. Rep. 202.) It is not admissible to corroborate other testimony. (*Elliott on Evidence*, 316.) Exhibit "X" is not a memorandum made by a party having personal knowledge, and who therefore would not be a competent witness to the fact. It is not a correct copy of a memorandum so made. It is an independent creation by two people from oral statements and memoranda. Erb was a witness for these defendants. Its use was not for the purpose of contradiction, but partly to corroborate and partly as original evidence of the fact. It does not fall

within a single recognized exception to the rule permitting hearsay.

Memorandum-books, even when made by the party who had personal knowledge of the fact, are not admissible, under the exception of entries in books. (Elliott on Evidence, 459; *In re Fulton Estate*, 178 Pa. 78, 35 L. R. A. 133, 35 Atl. 880; *Richardson v. Emery*, 23 N. H. 220; *Gregory v. Jones*, 101 Mo. App. 270, 73 S. W. 899; *Security Co. v. Graybeal*, 85 Iowa, 543, 39 Am. St. Rep. 311, 52 N. W. 497; *Simons v. Steele*, 82 App. Div. 202, 81 N. Y. Supp. 737; *Rankin v. Fidelity etc. Co.*, 189 U. S. 242, 47 L. Ed. 792, 23 Sup. Ct. Rep. 553; *Costelo v. Crowell*, 139 Mass. 588, 2 N. E. 698.)

In the case of *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613, cited by appellants, the surety claimed that Farham, the payer of the note, had deposited grain and had directed the application of the proceeds on the note. It was held that if this was true, and that the payee without the sureties' consent had applied it otherwise, there would be a release. In the instant case no direction had been given by Erb. The indorsers knew and assented to other uses of this money. The cases are totally unlike in the essential facts which are necessary to effect a release of the surety.

In the Iowa case, *De Goey v. Van Wyk*, 97 Iowa, 491, 66 N. W. 787, the court construes the instruction and holds that it means that if plaintiff (the creditor) took any of the mortgaged property and disposed of it or appropriated it to his own use, and did not apply it to the discharge of the debts which the mortgage secured, the security would be released. That this is the law, when the security is reduced to the possession or control of the creditor, is conceded; but in the case now being determined, the bank never had the custody or control of the chattel property. An examination of the case of *Farmers' Bank v. Arthur*, 75 Iowa, 129, 39 N. W. 228, will disclose that such is the rule, and the court further holds that the creditor is under no duty to show what had become of it or to do anything to

preserve it. This is supported by *Hunt v. Purdy*, 82 N. Y. 486, 37 Am. Rep. 587; *Wasson v. Hodshire*, 108 Ind. 26, 8 N. E. 621.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to recover judgment for the sum of \$5,000 alleged to be due upon a negotiable promissory note executed to the plaintiff by defendant Erb and indorsed for value by the defendants Raiff and Anderson, on December 1, 1906, and due and payable eight months thereafter, with interest at the rate of one per cent per month, payable semi-annually. It is alleged that no part of the principal sum or interest has been paid, except the sum of \$212.72 paid on September 19, 1907, and \$108 paid on July 31, 1908. The defendants Raiff and Anderson filed a separate answer, in which they deny that they indorsed the note for value, and allege the following as an affirmative defense: That at the time the note was executed by Erb and indorsed by them Erb was a customer of the plaintiff; that it was then supplying him with money to purchase sheep in large numbers; that these defendants were the owners of sheep consisting of wethers and bucks, and a shearing plant which Erb desired to purchase from them, at an agreed price of \$13,103, but did not have a sufficient amount of money to make payment, having then on deposit with plaintiff only about \$700; that the officers of the plaintiff, in order to assist Erb, agreed to lend him the necessary sum, on condition that he would execute to it a chattel mortgage on all of the sheep, together with the wool produced by them during the existence of the mortgage, and also the shearing plant; that it was expressly agreed by the plaintiff, Erb, and these defendants that the mortgage should be made to secure the full amount of the purchase price so advanced by the plaintiff, and that the money then on deposit to the credit of Erb should be used in caring for the sheep; that Erb thereupon executed the mortgage to secure payment of the loan, it being evidenced by three promissory notes, two for \$5,000 each, and a third for \$3,103, all of

the same date and tenor, except the principal sum named in the last, the defendants indorsing them all in blank; that the note upon which this action is based is one of these notes, the others having been paid; that it was agreed that, if Erb defaulted in the payment of the notes, the mortgaged property should be sold, and the proceeds applied to the discharge of them; that under the agreement and the rule of law applicable it became the duty of plaintiff first to exhaust this security before taking recourse against these defendants upon their contingent liability; that the mortgage was never foreclosed; that plaintiff permitted Erb to sell the greater portion of the sheep, realizing various sums of money, which he paid to the plaintiff, but which it failed to apply to the discharge of the notes, though it was its duty to do so. These sums are set out in detail in the answer, and include the sum of \$2,200, the price obtained from the wool shorn from the sheep during the summer of 1907. It is alleged that plaintiff took possession of 315 head of sheep covered by the mortgage, of the value of \$945, and converted them to its own use, and that it also took possession of the shearing plant, which was of the value of \$1,400, and now claims to be the owner of it. The sums so paid to the plaintiff and the property delivered to it by Erb, it is alleged, were sufficient to discharge all of the indebtedness evidenced by the notes. It is alleged, that at various times prior to the bringing of this action these defendants requested the plaintiff to make an accounting for the amounts paid to it by Erb, and that it apply them to a discharge of the notes, signifying their readiness to pay any balance which might be found to remain unpaid, but that plaintiff wholly failed to render such accounting, claiming that these defendants were not entitled to have such application made. It is further alleged that, by reason of the premises, these defendants are entitled to be discharged from liability in any amount. They pray that the plaintiff be required to account for all sums paid to it by Erb, and for the reasonable value of all property received from him, and that credit be given accordingly. There was issue by reply. J. B. Herford, Esq., was ap-

pointed by the court referee to hear the evidence and determine the issues.

The evidence discloses that three sales had been made by Erb prior to May 17, 1907, the proceeds aggregating \$8,288.50, which had been applied to the payment of the smaller and one of the larger notes, fully discharging them, the first being paid on March 23, 1907, and final payment on the latter being made on May 17. Up to this date no other sales had been made. Subsequently sales of bucks were made to different persons; in some instances the proceeds being paid by Erb to the plaintiff; in others it does not appear what was done with them. The total of the sums paid to plaintiff resulting from these sales, was \$551. All sums paid to the plaintiff were credited to Erb's current account. He drew checks upon this account from time to time to pay his personal expenses, the expenses of caring for the mortgaged property, and to buy other sheep, borrowing other sums from the plaintiff as he needed them. In the fall of 1907, after the note in suit fell due, the wool shorn from the sheep left on hand was sold for \$2,200; the proceeds being paid to the plaintiff. Erb gave to the plaintiff his bill of sale for the shearing plant, with other property not involved here; the consideration named being \$1. The purpose of this, as stated by the president of plaintiff, was to avoid the expense of foreclosure. After several efforts by the plaintiff to sell this at private sale, it had the sheriff sell it at public auction, and bought it for \$330.

The referee adopted the theory that the bank was under no obligation to Erb to apply the proceeds of his sales to the payment of the indebtedness represented by the note, but that, upon demand by Raiff and Anderson after the note fell due, it was under obligation to so apply such proceeds as were shown by the defendants to have been paid to it by Erb, and that they were entitled to be released *pro tanto* from liability, whether such credit had actually been given or not. Accordingly he directed his efforts to ascertain from the evidence what amounts were paid by Erb to the bank after defendants made demand for such

application, and gave credit for them. He found that the plaintiff ought to have so applied the \$2,200 received from the sale of wool on August 1, 1907, the \$551 received from the sale of bucks, as of October 15, 1907, and the \$330, the price brought by the shearing plant, as of October 27, the date of the bill of sale. Upon adjusting the interest, making allowance for the payments admitted in the complaint, he found the defendants Raiff and Anderson liable for a balance of \$2,319, with interest at the rate of one per cent per month from October 22, 1907. He recommended judgment against all the defendants in this amount, and against Erb for the full amount of the note, less the admitted payments. The court adopted the findings and ordered judgment accordingly. Defendants Raiff and Anderson, hereinafter referred to as the defendants, have appealed from the judgment and an order denying their motion for a new trial.

Counsel for plaintiff discuss at some length in their brief the liability of accommodation and irregular indorsers under the negotiable instruments law (Rev. Codes, secs. 5877, 5912), and the distinction between the liability of such parties and mere sureties, as defined by section 5680 of the Revised Codes; their purpose being, we presume, to demonstrate that the theory of the case adopted by the trial court is fundamentally erroneous. Consideration of all questions in this connection, however, must now be deemed foreclosed. Counsel did not at any stage of [1] the proceedings in the trial court question the sufficiency of the allegations in the answer to constitute a complete defense, and submitted the case to trial on the theory that defendants would be entitled to judgment if the court found that the proceeds of the mortgaged property which were paid to it by Erb after demand by defendants, together with that part of it which came into plaintiff's hands, was sufficient to pay all the notes. By failing to make timely objection and to appeal, the plaintiff must be deemed to have acquiesced in the theory which the trial court adopted and upon which the case was tried and determined. A party may not himself adopt, or induce the court to

adopt, one theory of the case at the trial, and allow it to proceed to final determination without objection, and thereafter insist in this court that the trial should have proceeded upon a wholly different theory. (*Dempster v. Oregon S. L. Ry. Co.*, 37 Mont. 335, 96 Pac. 717; *Cohen v. Clark*, 44 Mont. 151, 119 Pac. 775; *Raiche v. Morrison*, 47 Mont. 127, 130 Pac. 1074.) We are therefore not required to go further than to examine and determine the questions arising upon the assignments found in the brief of counsel for the defendants.

We notice first the contention that it was error to exclude from the evidence what is designated in the record as Defendants' Exhibit X. The evidence discloses that soon after the notes and mortgage were executed to defendants, Erb began to sell the sheep in lots as he found purchasers, depositing the proceeds with the plaintiff, notifying its officers what he was doing. Early in December, 1906, he sold and shipped 600 wethers to a firm in Spokane, Washington, realizing \$3,600. Subsequently he made similar sales, depositing the proceeds as before, until he sold the last of them in October, 1907. When [2] ever sales were made and the proceeds deposited, he entered in a vest pocket memorandum-book the amounts received, adding in some instances the date of the sale, the number sold, and the name of the purchaser. The memorandum consisted of a list of all amounts received and deposited, except one of \$2,200, the price received for wool sold during the summer of 1907. From time to time Erb showed this memorandum to defendant Raiff, who copied off the items upon a sheet of paper which he kept in his office. The Erb memorandum did not show the amount received from the sale of wool. This was included in Raiff's memorandum upon Erb's verbal statement that the sale had netted that amount. The gross receipts of these sums footed up \$13,847.50. The Erb memorandum had been lost. The original copy of it made by Raiff had also been lost, but Raiff had preserved a copy. Counsel, having had Raiff state that the copy contained a correct list of the items obtained from Erb, who had theretofore testified that his list of the items was

correct, offered it in evidence as an exhibit to Raiff's testimony, to show the amount actually received by plaintiff. It was excluded as hearsay. The ruling was correct. The memorandum thus kept by Erb was fugitive in character, not intended as a record of his transactions from day to day in his regular course of business. It might have been used by him to refresh his memory or to aid him in giving his testimony, under the rule declared by the statute (Rev. Codes, sec. 8020; *Marron v. Great Northern Ry. Co.*, 46 Mont. 593, 129 Pac. 1055), but could have been available for no other purpose. Therefore a copy of a copy of it made by Raiff was as much hearsay as would have been an oral statement by Raiff of the items communicated to him verbally by Erb.

Of the several other contentions made by counsel for defendants, it is not necessary to give special notice to any, except that the court and referee erred in failing to find defendants entitled to credit for other items which they allege in their answer they were entitled to, viz.: For \$2,150 for wethers sold to one Phillips; for \$368, the price of bucks sold to one Bray; and for \$1,100, the value of the shearing plant, instead of \$330, the amount realized from the sale of it by the plaintiff. Touching the first of these items, the evidence discloses the following: The mortgage included 846 yearling wethers and 1,261 three and four years old—2,107 in all. Of these, Erb sold in December, 1906, 600 for \$3,600; on March 5, 1907, 542 for \$3,142.25; and about April 3, 265 for \$1,546.25. These sales included all of the older wethers and 146 of the yearlings, leaving 700 yearlings still in Erb's hands. During the season of 1907 up to August he bought from other persons 3,490 yearlings, and 1,230 other sheep, the character of which does not appear. He estimated that, of the 700 yearlings covered by the mortgage, as many as 200 were lost by death and other causes, leaving on hand 500. These were mingled with those subsequently purchased and were sold. The evidence does not disclose when or to whom they were sold, nor at what price, except that Erb testified that in November, 1907, he sold all the sheep he had left on hand to Phillips at \$4.30 per

head, and paid the proceeds to the bank as a general credit on his account. Included in these, he said, were perhaps a few of the mortgaged sheep, but he was unable to give the number. Aside from this evidence there is nothing to show what became of these wethers, nor does it appear what was their value. With only this evidence before him, the referee was justified in his statement that there was nothing upon which to base a finding in favor of the defendants.

In all, Erb purchased from the defendants 900 bucks. The evidence discloses that of these some were lost by death, and that he sold all the rest to different persons in small lots, the proceeds of these sales, to the amount of \$551, being paid to the bank. For this amount the defendants were given credit. One of his sales he made to Bray, but what the number was or the amount paid is not disclosed, except so far as it appears from Exhibit X, which we have held was properly excluded from the evidence. While Erb testified that he was paid by check which he turned over to the bank, this fact is not shown by the books of the bank or otherwise. The same disposition was made of this item as was made of the Phillips item, and we think this was correct.

Plaintiff acquired possession of the shearing plant and made disposition of it as heretofore stated. The evidence shows that [3, 4] it had been purchased from the manufacturer by Erb. It had never been owned by the defendants, but, at their instance, had been included in the mortgage. It consisted of an engine and twelve shearing machines. The engine, the evidence shows, cost originally \$500, and each machine \$50, making the total original cost \$1,100. It had been used during the season of 1906. It was used during the season of 1907, four more machines being added, making the entire cost \$1,300. At the time the bill of sale was executed the plant was, according to Erb's testimony, as good as new. No witness stated, however, what its reasonable market value was at the time plaintiff got possession of it, or at the time when it was sold. The referee was of the opinion that the price brought at the sale was the best evidence of its value, and made his finding

accordingly. The original cost price of an article is some evidence of its market value (*Osmer v. Furey*, 32 Mont. 581, 81 Pac. 345); so also is the amount brought by it at sheriff's sale. (*Id.*) Neither, however, is conclusive. The referee, in arriving at a conclusion upon the evidence before him, was compelled to choose between the extremes of value fixed by it. There were no data to justify the finding of any value between these extremes. Under these conditions we do not think the referee or the court was guilty of palpable abuse of discretion.

It may be remarked, in general, that the evidence wholly fails to sustain the allegation of the answer that the plaintiff agreed to look to the mortgage exclusively as security in the first instance. The evidence justifies the conclusion that the mortgage was taken for the benefit of the defendants and at their request. [5] It also justifies the conclusion that the defendants knew the course of conduct Erb was pursuing with reference to the property and its proceeds; he, in one instance at least, seeking their advice as to the propriety of the course to be pursued by him. They knew that he was purchasing other sheep with which he was mingling the mortgaged property, and that its identity was thus likely to be lost. Both they and the plaintiff seem to have tacitly understood that Erb was to have free hand in the handling of the property and its proceeds for the purpose of speculation, and that upon a disposition of it he would discharge the notes by application of the proceeds. Upon the theory that defendants' liability was that of sureties only, and that plaintiff was bound to refrain from doing anything which would impair the mortgage security or which was inconsistent with their rights as sureties (Rev. Codes, sec. 5686), after having impliedly given their assent to the course of conduct pursued by Erb, they cannot insist that they were injured by any loss which occurred through his mismanagement or misappropriation of the proceeds.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

BRUNDY, RESPONDENT, v. CANBY ET AL., APPELLANTS.

(No. 3,490.)

(Submitted February 16, 1915. Decided April 8, 1915.)

[148 Pac. 315.]

*Cancellation and Reformation of Instruments—Mistake of Law—
Complaint—Sufficiency—Laches—Placing Party in Statu Quo
—Estoppel—Findings—Descent and Distribution—Heirship.*

Heirship—Statutes.

1. *Held*, under subdivisions 2 and 4 of section 4820, Revised Codes, that to enable nieces or nephews to share an estate with a surviving wife, there must be a surviving brother or sister of the decedent and neither father nor mother.

Cancellation and Reformation of Instruments—Complaint—Mutual Mistake—Sufficiency.

2. In a suit for the reformation of one and the cancellation of another instrument because executed under the influence of mutual mistake of the parties, the complaint contained a paragraph setting forth that plaintiff did not know whether defendants were honestly mistaken, that she was led by their conduct to believe, and did believe, that they were mistaken, but that, if they learned otherwise, they concealed the knowledge and information from her, *etc.* *Held*, that the latter averment did not render the pleading of mutual mistake ineffective.

Same—Mistake of Law—Equity.

3. The rule that a court of equity will grant relief on the ground of a mutual mistake when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other, has application to a case involving a mutual mistake of law, accurate legal knowledge not being imputable to all the world.

Same—Mutual Mistake—Evidence—Sufficiency.

4. Evidence *held* sufficient to warrant a finding of mutual mistake in the execution of the instruments in controversy.

Same—Laches—Presumptions.

5. Though laches may arise from an unexplained delay short of the period fixed by the statute of limitations, it will not be presumed from such a delay alone; unless it is made to appear affirmatively that unusual circumstances exist which, on account of such delay, render the proceeding inequitable, relief cannot be denied.

Same—Laches—Complaint.

6. A mere delay in commencing suit, short of the period of limitation, need not be excused in the complaint.

Same—Laches—Doctrine Inapplicable, When.

7. The application of the doctrine of laches *held* inapplicable, where the circumstances were such as to excuse a failure to discover a mistake of law, and the situation of the defendants had not changed to their prejudice.

Same—Placing Party in Statu Quo—Complaint.

8. Where plaintiff in her complaint in a suit seeking cancellation stated that she received nothing of value from the defendants, an allegation offering to place them *in statu quo* was unnecessary.

Same—When Restoration not Required.

9. Persons who were mistakenly deemed by plaintiff to have an interest in the property of her deceased husband as heirs and as such joined in a contract of sale thereof, gave nothing of value which it was her duty to restore, and assumed no liabilities as grantors or guarantors, and hence their situation was not so changed by the transaction as to render a decree in favor of plaintiff inequitable without requiring them to be placed *in statu quo*.

Same—Restoration of Consideration—When Unnecessary.

10. Plaintiff, in a suit for the cancellation of an instrument reciting a consideration of one dollar, was not required to allege and prove an offer to return such consideration, where the decree in plaintiff's favor rightfully required the defendant to account to the former for a large sum of money.

Same—Restoration of Nominal Consideration—"De Minimis" Doctrine.

11. Under the doctrine of *de minimis non curat lex*, a court of equity would not be justified in denying cancellation of an instrument involving valuable property rights, merely because the return of the nominal consideration of one dollar was not formally offered.

Same—Estoppel—Retention of Benefits.

12. Plaintiff, who was the sole heir of her deceased husband but mistakenly believed others to be heirs, and under such belief, jointly with them, executed an instrument of sale whereby only one-half of the purchase price was to be paid to her, whereas she was entitled to the whole thereof, was not estopped to seek cancellation of the instrument by reason of her receipt and retention of one-half of the first installment of the purchase price.

Same—Estoppel by Ratification—What Does not Constitute.

13. An act done in ignorance of one's rights or under the influence of the mistake which induced the contract sought to be canceled, does not constitute an estoppel by ratification.

Findings—Error—When Immaterial.

14. Where findings excepted to are unnecessary to a decision, error in making them will not work a reversal of the decree.

Same—Refusal—When not Error.

15. Refusal to make findings upon matters not at issue is not error.

Same.

16. Where the court found that a contract had been entered into by the mutual mistake of the parties, a requested finding that fraud had not been practiced upon plaintiff was properly refused.

[As to causes and proceedings for reformation of instruments, see notes in 65 Am. St. Rep. 481; 117 Am. St. Rep. 227. As to cancellation of instrument for negligent mistake of one party, see note in Ann. Cas. 1913A, 432. As to refusal of relief because of laches, see notes in 54 Am. Dec. 130; 2 Am. St. Rep. 795; 23 Am. St. Rep. 148. As to enforcement in equity of stale claims, see note in Ann. Cas. 1914B, 314.]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

ACTION by Sally A. Brundy against Benjamin H. Canby and others. Judgment for plaintiff, and defendants appeal from it and from an order denying a new trial. Affirmed.

Messrs. H. G. & S. H. McIntire, for Appellants, submitted a brief and argued the cause orally.

Consideration: It is alleged that plaintiff received no consideration for the contract, and as a corollary to that postulate, that there is nothing for her to do to place the parties *in statu quo* as a condition precedent for a cancellation or rescission of the contract. The fact that the joining with claimants in the contracts was not of as great value as was at first supposed, affects the adequacy of the consideration but not its sufficiency in point of law. It is not necessary that the consideration be adequate in value in order to support a contract. (*Kelly v. Lynch*, 22 Cal. 661, 665.) Degree of consideration is not material so long as there is some advantage to promisor or injury to promisee. (*Comstock v. Breed*, 12 Cal. 286, 288.) Disproportion in value does not affect. (*Frey v. Clifford*, 44 Cal. 335, 341.) Finding of want of consideration not shown when parties to deed become sureties on note, valuable consideration appearing by their executing note. (*Grigsby v. Schwarz*, 82 Cal. 278, 282, 22 Pac. 1041.) "Any act done by promisee at request of promisor by which former sustains any loss, trouble or inconvenience, constitutes sufficient consideration for promise, although latter obtains no advantage and with respect to extent of such loss, trouble or inconvenience it is immaterial that it is of the most trifling description, provided it be not utterly worthless in fact and in law." (*Clark v. Sigourney*, 17 Conn. 511; *Stocking v. Sage*, 1 Conn. 519; *Morley v. Boothby*, 3 Bing. 107, 112, 11 Eng. C. L. 53, 10 Moore, 395, 130 Eng. Reprint, 455; *Willatts v. Kennedy*, 8 Bing. 5, 10, 21 Eng. C. L. 200, 131 Eng. Reprint, 301; *Jones v. Ashburnham*, 4 East, 455, 463, 2 H. Black. 312, 102 Eng. Reprint, 905.) And even if Mrs. Brundy's promise had been gratuitous, the rule would not be changed. (*Lasar v. Johnson*, 125 Cal. 549, 553, 58 Pac. 161; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286.)

"*Mutual promises*, one to other, sufficient consideration for promise of each, and contract is valid and binding." (*West*

v. *Crawford*, 80 Cal. 19, 32, 21 Pac. 1123; *Murphy v. Rooney*, 45 Cal. 78, 79; *Christian College v. Hendley*, 49 Cal. 347, 350; *Mound City L. & W. Assn. v. Slauson*, 65 Cal. 425, 427, 4 Pac. 396; *Funk v. Hough*, 29 Ill. 145; *Twin Creek etc. Road Co. v. Lancaster*, 79 Ky. 552; *Amherst Academy v. Cows*, 23 Mass. (6 Pick.) 427, 17 Am. Dec. 387; *George v. Harris*, 4 N. H. 533, 17 Am. Dec. 446; *Briggs v. Tillotson*, 8 Johns. (N. Y.) 304, 306.) In *Street v. Galt*, 136 App. Div. 724, 121 N. Y. Supp. 514, it is held that a promise is based upon a good consideration if the promisee does anything legal which he was not bound to do.

Rescission: This being a suit to rescind or cancel a contract, we now inquire what the essential prerequisites of such an action are. Section 5065, Revised Codes, requires: (1) Prompt action on the part of the party seeking to rescind; (2) Restoration of everything of value received under the contract, *i. e.*, the placing of the parties *in statu quo*. These rules are but a crystallization of the general law on the subject, and they have been frequently referred to and applied by this court. (*Streicher v. Murray*, 36 Mont. 45, 59, 92 Pac. 36; *Turk v. Rudman*, 42 Mont. 1, 111 Pac. 739; *Ott v. Pace*, 43 Mont. 82, 115 Pac. 37; *Fratt v. Daniels-Jones Co.*, 47 Mont. 487, 133 Pac. 700.) In the present case there has not been the prompt action which statute and the general law require. (See *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807.) True, this case applies the doctrine to the statute of limitations, but it has been frequently held to be equally applicable to equitable actions, and to the principle of negligent delay or laches. (*Cutter v. Iowa Water Co.*, 128 Fed. 505, 508; *Melms v. Pabst Brewing Co.*, 93 Wis. 153, 57 Am. St. Rep. 899, 66 N. W. 518, 524, 525; *Kavanaugh v. Flavin*, 35 Mont. 133, 88 Pac. 764; *Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299; *Shain v. Sresovich*, 104 Cal. 402, 38 Pac. 51.)

The claim is made that the contract in question was entered into because of a mistake of what the succession law is in regard to persons in the relationship of the defendant claimants. Failure on the part of Allen, the administrator, and plaintiff, to ascertain what, if any, rights the claimants had in the estate

between Allen's appointment in February and the transaction in July, constitutes want of ordinary care; in other words, is negligence both on the part of Allen, and, as the agent's negligence is imputable to the principal (2 Pomeroy's Eq. Jurisp., 2d ed., sec. 676), of the plaintiff. Negligence is one of the familiar grounds of estoppel. (Bigelow on Estoppel, p. 579; *Gaylord v. Van Loan*, 15 Wend. (N. Y.) 308; *Dezell v. Odell*, 3 Hill (N. Y.), 215, 38 Am. Dec. 628; *Hathaway v. Payne*, 34 N. Y. 92.) "Actual knowledge of the facts is not necessary if the party estopped was in such position that he ought to have known them, so that knowledge may be imputed to him." (2 Pomeroy's Eq. Jurisp., sec. 809.)

The statute also requires a restoration of all consideration received by the party seeking the rescission, a placing of all the parties *in statu quo*. This is but an application of the maxim, "He who seeks equity must do equity"; and it applies not only in cases of attempted rescission on the ground of fraud, but also, manifestly, where the rescission is sought because of mistake. (*Clint v. Eureka Crude Oil Co.*, 3 Cal. App. 463, 86 Pac. 817; *Rubie Combin. Gold Min. Co. v. Princess Alice etc. Min. Co.*, 31 Colo. 158, 71 Pac. 1121; *Snow v. Alley*, 144 Mass. 546, 59 Am. Rep. 119, 11 N. E. 764; *Kasch v. Labor Temple Assn.*, 18 Cal. App. 508, 123 Pac. 552; *Robinson v. Siple*, 129 Mo. 208, 31 S. W. 788, 791.) Nowhere, either in the complaint or in the evidence, in the present case is any offer or attempt shown to place the defendants *in statu quo*, either for the time, labor or expenses incurred by them to bring about the execution of the contract in question, or to relieve them from any of the obligations incurred by them because of said contract toward Wolvin and Simmons. Nor is the rule mitigated by, nor does it lie in the mouth of, plaintiff to say that these things are of little value. (See *Snow v. Alley*, *supra*; *Conner v. Henderson*, 15 Mass. 319, 8 Am. Dec. 103; *Morse v. Brackett*, 98 Mass. 205; *Bassett v. Brown*, 105 Mass. 551; *Estabrook v. Swett*, 116 Mass. 303; *Handforth v. Jackson*, 150 Mass. 149, 154, 22 N. E. 634.)

Nor can it be claimed that a rescission of a contract can be had on the ground of inadequacy of consideration. (*Cooper v. Reilly*, 90 Wis. 427, 63 N. W. 885.) So whether the contract in question was owing to any mistake, or to any fraud or misrepresentation, its rescission cannot be had unless the parties are placed *in statu quo*, and failing in this the suit cannot be maintained. At this point, and because of the similarity of many of its facts with the case at bar and its clear enunciation of several elemental principles which are applicable, we beg to call attention to the case of *Seat v. McWhirter*, 93 Tenn. 542, 29 S. W. 220, and also to *Haviland v. Willets*, 141 N. Y. 35, 35 N. E. 958.

Another feature attends the failure on the part of plaintiff to return, or to offer to return, whatever she had received from the defendant claimants upon her alleged discovery of the mistake which, as she states, she and they fell into, namely, that thereby there was a ratification or affirmance of the contract, of which she could not thereafter complain. (*Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269, 271.)

Ratification of transaction by accepting benefits thereof: A party who has secured to himself the benefits of a contract, and has accepted and used these benefits, has estopped himself in the courts from denying the validity or binding force of the instrument, or from setting up or asserting the contrary. (*Hathaway v. Payne*, 34 N. Y. 92; *Brundage v. Home Savings & Loan Assn.*, 11 Wash. 277, 39 Pac. 666; *Jones v. Langhorne*, 19 Colo. 206, 34 Pac. 997; *Allen v. Colorado Cent. Ry. Co.*, 22 Colo. 238, 43 Pac. 1015; *Lane v. Pacific etc. Ry. Co.*, 8 Idaho, 230, 67 Pac. 656; *James v. Seattle*, 57 Wash. 318, 106 Pac. 1114.)

Plaintiff was estopped by her conduct in resisting the attempt of claimants to recede from the contract. Neither in the law nor in the ordinary affairs of life may one be inconsistent. One may not blow hot and cold, nor mend his hold. (*Newell v. Meyendorff*, 9 Mont. 254, 18 Am. St. Rep. 738, 8 L. R. A. 440, 23 Pac. 333; *Mares v. Dillon*, 30 Mont. 117, 143, 75 Pac. 963.)

Mr. William Wallace, Jr., Mr. John G. Brown and Mr. T. B. Weir, for Respondent, submitted a brief; *Mr. Wallace* argued the cause orally.

Equity will cancel the contract in suit, under any of the following rules:

(1) Where the mistake is not one as to the general law but a mistake as to a clear rule of law affecting the rights of persons in private property, equity will relieve against a transfer made in the course of family compromises and settlements. (2 Pomeroy's Eq. Jurisp., sec. 846.)

(2) Wherever a party is mistaken or ignorant of her own antecedent and existing private legal right, interest or estate in property (whether induced to such mistake by the act of the other party or not, but especially if so induced, and whether the matter does or does not involve family compromise settlement), a court of equity will restore property parted with under such misapprehension. (*Id.*, sec. 849; *Baldock v. Johnson*, 14 Or. 542, 13 Pac. 434; *Benson v. Bunting*, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991; *Jeakins v. Frazier*, 64 Kan. 267, 67 Pac. 854; *Order of United Commercial Travelers v. McAdam*, 125 Fed. 358, 61 C. C. A. 22; *Blakemore v. Blakemore*, 19 Ky. Law Rep. 1619, 44 S. W. 96; *Renard v. Clink*, 91 Mich. 1, 30 Am. St. Rep. 458, 51 N. W. 692; *Drake v. Wild*, 70 Vt. 52, 39 Atl. 248; *Swedesboro Loan etc. Assn. v. Gans*, 65 N. J. Eq. 132, 55 Atl. 82; *Livingstone v. Murphy*, 187 Mass. 315, 105 Am. St. Rep. 400, 72 N. E. 1012; *Reggio v. Warren*, 207 Mass. 525, 20 Ann. Cas. 1244, 93 N. E. 805; *Hutchinson v. Fuller*, 67 S. C. 280, 45 S. E. 164; *Standard Oil Co. v. Hawkins*, 74 Fed. 395, 33 L. R. A. 739, 20 C. C. A. 468.)

(3) Whenever, because of a mistake as to the clear law, however induced, that which was believed, through the mistake to be a consideration, fails, and there is, on the true view of the law, no adequate consideration for the surrender of property, equity refuses to suffer the property to be thus sequestrated by a stranger and grants relief. (2 Pomeroy's Eq. Jurisp., secs.

842, 849; *Bunnell v. Bunnell*, 111 Ky. 566, 64 S. W. 420, 65 S. W. 607; *House v. Callicott*, 83 Miss. 506, 35 South. 761.)

(4) If a pure mistake of law, which would not be otherwise relievable (because not containing any of the elements, which are here present, and as shown above make the mistake partly one of fact) be accompanied by any act of the defendants or their counsel, though innocently done, calculated to encourage the error, or conceal the true rule, this makes a case for relief. (2 Pomeroy's Eq. Jurisp., sec. 847.) Section 4984, Revised Codes, but reaffirms the foregoing principles. The supreme court of California, in *Benson v. Bunting*, *supra*, after quoting their statute, section 1578, Civil Code, which is the counterpart of our section 4948, says: "In *Hunt v. Rousmanier's Admrs.*, 8 Wheat. (U. S.) 174, 215, 5 L. Ed. 589, 600, Chief Justice Marshall said: 'Although we do not find the naked principle that relief may be granted on account of ignorance of law, asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity.' " (*Benson v. Bunting*, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991.) Thus this forcible language of Chief Justice Marshall is applied to the interpretation and application of this particular statute of ours. (See, also, *Gregory v. Clabrough's Exrs.*, 129 Cal. 475, 62 Pac. 72; *Kyle v. Hamilton*, 6 Cal. Unrep. 893, 68 Pac. 484.) Perhaps the most complete summary of the foregoing rules is found in the case of *Reggio v. Warren*, 207 Mass. 525, 20 Ann. Cas. 1244, 93 N. E. 805.

Consideration: We do not dispute that the recited consideration is sufficient in law to support a contract otherwise valid; or that if claimants had been heirs at law, as recited, it would have been a valid and unassailable contract for the surrender of dower in claimants' supposed half of the estate. The fact that claimants took advantage of the impending mine trade to extort a surrender of the supposed dower would not have invalidated the contract because the supposed facts and conditions would have been the actual facts and conditions. What we do say is this: (1) Under the real as distinguished from the sup-

posed conditions, there was no adequate consideration for the contract. (2) A contract without consideration is a nullity, and may be defended against at law without seeking rescission. (3) A sufficient legal consideration is no bar to relief in equity for mistake, since equity avoids, on that ground, contracts otherwise valid in law, and one element of a contract valid in law is a sufficient consideration. (*Baldock v. Johnson*, 14 Or. 542, 13 Pac. 434.)

Promptness of rescission and restoration of claimants' original status: In the outset there was no plea of laches in claimants' answer, or of any facts from which it could be inferred; nor were any facts disclosing the same averred in the complaint. While the authorities are not in accord, it is probable that, in this state, in the absence of such a disclosure in the complaint, laches, like the bar of limitation, should be plead as a defense before it will be considered. (*Kavanaugh v. Flavin*, 35 Mont. 133, 88 Pac. 764; *American Min. Co. v. Basin & B. S. Min. Co.*, 39 Mont. 476, 481, 24 L. R. A. (n. s.) 305, 104 Pac. 525; *Dolenty v. Broadwater County*, 45 Mont. 261, 266, 122 Pac. 919; *Humphreys v. Butler*, 51 Ark. 351, 11 S. W. 479; *Simpson v. McPhail*, 17 Ill. App. 499; *DeWitt v. Miller*, 9 Tex. 239, 246.)

The considerations making for application of laches where a less period than that prescribed by statutes has elapsed, are (1) loss of important testimony through death of parties or witnesses, (2) substantial increase of value of the property, or (3) its sale to third persons. (*Bower v. Stein*, 177 Fed. 673, 101 C. C. A. 299.) These conditions, it would seem, should be alleged, and can only be alleged by affirmative pleading.

Waiving, for argument's sake, the above features, but eleven months elapsed between Allen's signing the petition and the commencement of this suit, but eight months between plaintiff's execution of the "dower release," and this suit; and less than thirty days between her discovery of the mistake and this suit; with abundant excuse for failing sooner to make discovery. Had there been no excuse, any of these periods are too short for the application of the doctrine of laches. (1 Beach on Modern

Law of Contracts, sec. 821.) None of the elements warranting an application of the doctrine of laches where a less period than that prescribed by statute has elapsed are present in this case; and in none of the cases cited by claimants was the period between the act complained of and the suit so brief as here.

General estoppel: This feature of estoppel has two aspects: (1) Estoppel by the alleged retention of benefits, which we have already considered above; and (2) an alleged estoppel by striving to hold claimants to the mine trade. As to the latter, see 2 Herman on Res Adjudicata & Estoppel, secs. 946, 798, 785, 791, 760, 763, 781, 792, 987; *Anthony v. Chapman*, 65 Cal. 73, 2 Pac. 889; *Whelan v. Brickell*, 4 Cal. Unrep. 47, 33 Pac. 396; *In re Belt's Estate*, 29 Wash. 535, 92 Am. St. Rep. 916, 70 Pac. 74. This court has disposed of this whole question of estoppel as applied to the present case by its decision in *Rausch v. Rausch*, 14 Mont. 325, 330, 36 Pac. 312. (See, also, *Hobbs v. McLean*, 117 U. S. 567, 29 L. Ed. 940, 6 Sup. Ct. Rep. 870.) Intelligent election, *i. e.*, action taken after plaintiff knew that she was the sole heir and could claim the whole estate, is an essential to an estoppel. (2 Herman on Res Adjudicata & Estoppel, secs. 948, 781, 1029, 1057, 1062; 16 Cyc. 733.) Here the findings are conclusive that plaintiff was laboring under the same mistake as to her title on July 12, when the matters said to constitute an estoppel transpired, as she was on July 8 when she signed the "dower release" and escrow, and as she was in all the months before after her husband's death. So, too, on the faith of what she then did, claimants must have parted with something, or so changed their position as that injury would result to them. (*Rausch v. Rausch*, *supra*; *Hobbs v. McLean*, *supra*.) This element of estoppel is also utterly wanting here.

MR. JUSTICE SANNER delivered the opinion of the court.

Henry Brundy died intestate, without issue and without father, mother, brother or sister him surviving. The plaintiff (respondent here) is his widow; she is seventy-nine years of age, inexperienced in business, destitute of legal knowledge, and

obliged to rely upon others for proper direction in the conduct of her affairs. The appellant Canby is, and in the transactions to which this suit relates was, the attorney in fact for the other appellants; and these—hereinafter called the claimants—are the issue of Henry Brundy's predeceased brothers and sisters. The defendant W. R. Allen is the administrator of the estate of Henry Brundy, deceased; and the defendant State Savings Bank is the depository of certain papers and the distributor of funds involved in this controversy.

On July 12, 1912, the plaintiff, as party of the first part, and the claimants, as parties of the second part, entered into an agreement, hereinafter referred to as Exhibit "A," which recites: "That for and in consideration of one dollar, cash in hand paid by the said parties of the second part to the said party of the first part, the receipt of which is hereby acknowledged, and upon the further consideration that the parties of the second part, by their attorney in fact and trustee, shall join with the said party of the first part * * * in the execution to one A. B. Wolvin * * * of a certain lease and option, and deed to purchase certain mining claims, the title to which is now vested in the heirs of the said Henry Brundy, deceased, subject to the rights of the party of the first part therein, the said party of the first part hereby relinquishes all right of dower, which she has or may have in the property, real and personal, * * * of her deceased husband, Henry Brundy, * * * and agrees to accept one-half of the proceeds of the sale of said property to said A. B. Wolvin * * * ; also one-half of all personal property, in full of her legal rights therein, either as widow or heir at law of said Henry Brundy, deceased."

The sale to Mr. Wolvin having been arranged, a lease option, a deed and an escrow agreement—hereinafter called Exhibit "B"—were executed the same day, the respondent joining with the claimants therein. Exhibit "B" provides: "The within deed is hereby placed in escrow in the State Savings Bank of Butte, Montana, to be delivered to A. B. Wolvin, his successors or assigns, upon payment of the following sums of money, to-wit:

\$1,000 on the day of the placing of the said deed in said bank; \$4,000 ninety days thereafter; \$5,000 six months * * * \$75,000 one year, * * * \$90,000 eighteen months. * * *

It is also agreed in event that A. B. Wolvin, his successors or assigns, do not make the payments when due, that the said bank will return to Benjamin H. Canby, attorney in fact and trustee, said lease and option and deed for cancellation. All money deposited by A. B. Wolvin, his successors or assigns, on account of said lease and option, shall be credited as follows: One-half to Sally Brundy, widow of Henry Brundy, deceased, the balance to Benjamin H. Canby, attorney in fact and trustee. * * * " Attached to Exhibit "B" is a memorandum providing for the payment of \$25,000 to N. W. Simmons, for his services in making the sale.

The complaint was filed on the 17th day of March, 1913. In addition to the facts above stated it avers that by reason of plaintiff's age and inexperience she left the details of the estate of Henry Brundy to the care of the attorneys thereof, who, for the purpose of securing accurate information concerning the relatives of said intestate to be embodied in the petition for letters of administration, consulted Stephen D. Sexton, then in Butte representing the claimants and asserting claims for them as heirs of said intestate, and upon the information thus obtained, erroneously set forth in said petition that there were surviving grandchildren of said intestate, of all of which she was ignorant; that the claimants have not and never had any interest whatever in said estate or any thereof; that shortly after the death of Henry Brundy they made themselves known and led her to believe, and she was otherwise led to believe, and she at all times until a short time prior to the filing of her complaint did mistakenly believe, that her interest in the estate and property of her husband was not to exceed a one-half interest besides dower, and she was not advised to the contrary until a few days before the commencement of this suit; that while she was laboring under this mistake, negotiations were pending for the sale referred to in Exhibit "A," during

which representatives of the claimants notified plaintiff, her counsel and the administrator, that title to said property could not be passed unless the claimants joined in the contracts and deeds, insisting that they were entitled to an undivided one-half of said realty, less whatever rights plaintiff's dower gave her therein, declaring that the only controversy was over the value and extent of her dower, and demanding as a condition to their joining in said contracts and deeds that she surrender her dower therein; that in various ways, which are recited, the claimants prior to the making of said sale and the contracts Exhibits "A" and "B," induced the plaintiff to rest in the belief that her interest in said property was but one-half, plus dower; that she does not know whether they were honestly mistaken themselves as to her and their rights, but by their statements and conduct was led to believe they were, and if at any time prior to the execution of said contracts they learned otherwise, they concealed such knowledge from her; that, knowing she was laboring under the mistaken belief referred to, the claimants induced her to execute Exhibits "A" and "B"; that had she known, been advised or even suspected that her interest in said property was a fee-simple absolute, and that the claimants had no interest whatever therein, she would not have entered into said contracts, and there is no consideration therefor; that while the claimants were insisting upon the surrender by her of her supposed dower claim in said property, when they came to draft Exhibit "A" they caused it to be so framed and worded as not only to surrender her dower, but all her legal rights as widow or heir at law in said property, though when she signed the same she believed, and was encouraged by them to believe, that the sole effect of said Exhibit "A" was the surrender of her supposed dower interest; that in so far as Exhibit "B" authorizes any payments to the claimants or to Canby, it was and is without consideration; that said administrator joined in said Exhibit "B" and the defendant bank assumed the obligations imposed thereby; that under its terms the sum of \$9,500 paid by Wolvin on said sale, has been divided between the claimants and the

plaintiff; that other sums will be paid into said bank by said Wolvin on account of said sale which the defendants bank and Allen propose to and will, unless restrained, pay over in part to the claimants; that they are for the most part nonresidents of this state and insolvent; that plaintiff has received nothing of value from the claimants under said contracts, but they have received moneys to the amount of \$4,750 which rightfully belong to her, and there is nothing, therefore, which she ought to return to them as a condition precedent to the cancellation of Exhibit "A" or the reformation of Exhibit "B." Her prayer is for the cancellation of Exhibit "A," for an adjudication that the claimants have no right in or to the moneys which have been or are to be paid on account of said sale; for the reformation of Exhibit "B" so as to provide that all moneys payable thereunder, save the sum due to Simmons, be paid solely to her; for a judgment against the claimants for the moneys already received by them under said Exhibit "B," and for such other relief as may be just.

A demurrer to the complaint was interposed by the claimants, and as the questions raised thereby recur upon the evidence, discussion of them will be deferred until their application to the whole case can be considered. The demurrer was overruled; whereupon the defendants answered. The separate answers of the bank and Allen are not material to the controversy at the present stage. The effect of the answer of the appealing defendants is to deny the essential allegations of the complaint, save the widowhood of the plaintiff; to allege their heirship and right to share in the estate of Henry Brundy, deceased, and recognition of such right by the plaintiff; to assert a consideration for Exhibits "A" and "B," and that the parties have acted thereon. The affirmative allegations of the answer are put in issue by a reply.

Trial was to the court sitting without a jury. Findings of fact and conclusions of law in substantial accord with the complaint were filed, and judgment was entered conformable to the prayer thereof. A motion for new trial was made and denied.

The case is before us on appeal from the judgment and from the order denying a new trial.

Thirty-three errors are assigned, based upon the overruling of the demurrer, the facts found, the offered findings refused, the conclusions of law, the judgment and the refusal of a new trial. Their effect is to present the following contentions: 1. That the complaint does not allege nor the the evidence show the contracts in question to have been executed under the influence of mistake, mutual or otherwise; 2. That the complaint does not allege nor the evidence show any "sufficient reason for the delay in instituting the present action, i. e., excusing the delay in ascertaining plaintiff's alleged rights"; 3. That there was a consideration for the plaintiff's execution of the contracts, and neither the complaint nor the evidence discloses any offer by her to place the claimants *in statu quo*; 4. That the plaintiff is estopped to demand a rescission by her acceptance and retention of benefits under the contracts, and by her resistance to an attempt of the claimants to recede therefrom; 5. That certain findings made, and the refusal of certain others proposed, none of which are germane to the foregoing propositions, were erroneous; 6. That the money judgment against Canby was improper. Of these in their order.

1. Whether there was a mistake or not depends primarily upon the status or relationship of the claimants to the estate of Henry [1] Brundy, deceased. Are they his heirs at law, and entitled to share in his estate as such; or is the plaintiff his only heir? Subdivision 4 of section 4820, Revised Codes, reads: "If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother nor sister, the whole estate goes to the surviving husband or wife." In this language there is nothing ambiguous. It is crystal-clear and within itself defies construction. Applied to the facts of this case, it can lead to but one result, *viz.*: That the plaintiff is the sole heir at law of Henry Brundy, deceased. (*In re Ingram's Estate*, 78 Cal. 586, 12 Am. St. Rep. 80, 21 Pac. 435; *Carmody's Estate*, 88 Cal. 616, 26 Pac. 373; *Nigro's Estate*, 149 Cal. 702, 87 Pac. 384; *Cigaran's Estate*,

150 Cal. 682, 89 Pac. 833; *Sweetland v. Transberg*, 176 Fed. 641.) This provision is, however, but a subdivision of section 4820, and though its words be clear in meaning, may nevertheless require construction by reason of its correlations. On this the claimants ground themselves, asserting that subdivision 4 must be read in connection with subdivision 2, and that, when so read, the issue of predeceased brothers and sisters cannot be excluded from succession. Subdivision 2 is as follows: "If the decedent leave no issue, the estate goes one-half to the surviving husband or wife, and the other to the decedent's father and mother in equal shares, and if either be dead the whole of said half goes to the other. If there be no father or mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation. * * * " This language also is clear. It plainly indicates that had Henry Brundy left a surviving sister or brother, then the claimants in this case would be entitled to share in his estate. There is no conflict here with subdivision 4; on the contrary, collating the two subdivisions, we find a plain legislative declaration that to enable nieces or nephews to share an estate with a surviving wife, there must be a surviving brother or sister and neither father nor mother. The suggestion is made that the right of succession to nieces and nephews ought not to rest "upon such a fortuitous, and in the course of nature such an unlikely, circumstance"; but with this we have nothing to do. Succession to estates is purely a matter of statutory regulation; if something may be said against the law as it is written, much may also be said in its defense. At any rate, it is so written and our duty is to recognize and apply it.

Now, the complaint alleges with some elaboration that the [2] plaintiff entered into the contracts under the belief, apparently shared by the claimants and induced in part by their conduct, that her interests in the estate of Henry Brundy were limited by law to one-half thereof—plus dower—the other half—subject to dower—going to the claimants by right of succession.

These are averments of mutual mistake, the notion being erroneous. Our attention is called, however, to paragraph X, which, it is said, destroys the foregoing and leaves the complaint without any effective allegations on the subject. Paragraph X sets forth, in substance, that she "does not know" whether the claimants were honestly mistaken as to her rights; that she was led by their conduct to believe, and did believe, that they were so mistaken, but that, if they learned otherwise, they carefully concealed their knowledge and information from her. The contention is that these allegations invoke the provisions of subdivision 2 and utterly exclude the idea of mutual mistake covered by subdivision 1 of section 4984. In support of this we are cited to *Bottego v. Carroll*, 31 Mont. 122, 77 Pac. 430. In that decision it was held that allegations of a mistake of law by one party, coupled with fraud by the other, are not supported by proof of mutual mistake. But such is not the condition here. Paragraph X is in the alternative. It does not categorically allege anything except that she was led to believe, and did believe, the claimants to be honestly mistaken; its efficiency is made to depend upon the development of the case. The most that can be said is that, as a potential inconsistency, it might have laid the complaint open to a demurrer for ambiguity. But no such demurrer on this ground was filed, and it would be an altogether unwarranted application of *Bottego v. Carroll*, to say that paragraph X results in a total annihilation of the complaint.

The court found as a matter of fact that before and at the [3, 4] time Exhibits "A" and "B" were executed, as well as thereafter, the claimants and the plaintiff alike labored under the mistake set forth in the complaint. To challenge this as without support in the evidence seems almost captious. That both parties acted upon the same erroneous notion of the law, that the plaintiff thought she knew the law and that she was honestly mistaken about it, are matters too plain from the record for discussion; and honest mistake must be credited to the claimants as well, unless we impute to them the grossest fraud.

Nowhere do they disclaim the notion or belief that they are in truth heirs at law of Henry Brundy; on the contrary, since the day of his funeral they have persistently maintained it; promptly they pressed their claims as such upon both the plaintiff and the administrator; vigorously they asserted the necessity of their assent to a valid sale of the property; repeatedly they alleged in their answer that the plaintiff made no mistake because they are heirs; and their contentions in that behalf have been presented to the trial court and to this court with signal ability. Almost the last word of their counsel upon this subject is this: "That Sexton and they were actually ignorant appears not only from the action of Sexton in regard to the withdrawal of the papers, *etc.*, on July 12, 1912, but from his testimony that he knew nothing of the laws of Montana."

It is said, however, that mutual mistake "is untenable if either party knew, or, what is the same thing, had the means of knowing, the subject matter of the alleged mistake. Certain it is that plaintiff and her *alter ego*, Allen, were possessed of the means of knowledge, and any exercise by them of the duty of inquiry would have disclosed everything that they now claim they have discovered." Means of knowledge, generally speaking, do not affect the fact that a mistake was made, but only the availability of it as a basis for relief. If a logical exception be claimed to exist where the means of knowledge are inherent in the subject matter itself, such exception can be applied here only by virtue of the supposed presumption that the law is known to all. There is a rule that ignorance of the law does not excuse, but we know of no presumption imputing accurate legal knowledge to the world at large. The necessary result of such a postulate would be that a mistake of law can never occur because, accurate knowledge being in every instance present in the mind which entertains the wrong notion, to entertain such notion is no mistake, but deliberate choice. How far this is from the true state of affairs may be gathered from the following provisions of our Code: A party to a contract may rescind the same if his consent thereto was given by mistake (Rev. Codes,

secs. 5063, 6112), such consent so given being not real but only apparent (Rev. Codes, sec. 4973); mistake may be either of fact or of law (Rev. Codes, sec. 4982); mistake of law exists when there is: "1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or 2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify." (Rev. Codes, sec. 4984.)

But the claimants intimate other grounds for their position—the facts, for instance, that Governor Allen, the administrator and supposed agent of the plaintiff had seen the statute of succession and that the estate had counsel—in consequence of which, coupled with the presumption above mentioned, mistake on her part is legally unthinkable. While there is evidence that a part of the statute of succession had been read to Governor Allen, there is nothing whatever to show that subdivision 4 of section 4820 had been called to his attention until long after the contracts were signed. The estate had counsel, it is true, but they were not counsel for the plaintiff, and they, misled as to the facts, unwittingly misled Governor Allen as to the law, and it is not at all strange that he, a layman, though he had seen the law, should have distrusted his own capacity to understand it. The theory of the argument is that only blameless mistake will afford a basis for relief. Such is not correct: "The term 'mistake' involves the conception that he to whom the fault expressed by it is imputed has been guilty of some degree of negligence which may or may not be excusable when viewed in the light of the circumstances of the particular case. Courts of equity are not bound by cast-iron rules. The rules by which they are governed are flexible and adapt themselves to the exigencies of the particular case. Relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." (*Parchen v. Chessman*, 49 Mont. 326, 339, 142 Pac. 631.) These observations have special application to mutual mistakes of law, in order

that the statute authorizing relief in such cases may not be nullified.

Circumstances excusatory of plaintiff's mistake appear in ample measure. The fact that even after she brought this suit the claimants have felt warranted in contesting her construction of the law; that painstaking counsel, the learned judge of the court below, and the members of this court have all been called upon to participate in its settlement, furnishes at least some explanation for the ignorance of an old lady inexperienced in business, unfamiliar with the law, and dependent for guidance upon others whose well-meant efforts to be correct but led them further into error. In general, it may be said that the evidence clearly and affirmatively discloses that while things occurred before and at the time the contracts were made, to increase her reliance in the misapprehension she then had, nothing at all happened until just prior to the bringing of this suit to suggest to her that she might have been mistaken or that there was anything to correct. In our opinion, a finding denying mutual mistake would have been impossible.

It was also expressly found that had the plaintiff, or the administrator, known, believed, suspected or been told that claimants were not in fact heirs of Henry Brundy, she would not have executed Exhibits "A" and "B." The criticism of this finding seems based rather upon the idea that her ignorance was inexcusable and therefore of no avail, than upon the view that it is without foundation in the testimony. However, that may be, Exhibit "B" itself, together with her testimony and that of Governor Allen, afford ample warrant for the finding.

2. The subject of delay is adroitly made to suggest two aspects, viz.: In commencing suit, and in the ascertainment by plaintiff [5, 6] of her rights. The suit was brought within nine months after the transactions in question, and the time within which it could, as a matter of limitation, have been brought is two years after discovery. (Rev. Codes, sec. 6449.) Assuming, however, that where laches appears on the face of the complaint, advantage thereof may be taken by demurrer for substance, and conceding

that under the maxim, "Equity aids the vigilant," laches may arise from an unexplained delay short of the period fixed by the statute of limitations, still laches will not be presumed from such a delay alone. (*Wright v. Brooks*, 47 Mont. 99, 108, 130 Pac. 968.) It must be made to appear affirmatively that unusual circumstances exist which on account of such delay render the proceeding inequitable; else relief cannot be denied on this ground. When such circumstances do not appear from the face of the complaint, they must be pleaded by the answer, to be available. (16 Cyc. 179, 180; *Kelley v. Boettcher*, 85 Fed. 55, 62, 29 C. C. A. 14; *Wyman v. Bowman*, 127 Fed. 257, 269, 62 C. C. A. 189; *Lux v. Haggin*, 69 Cal. 255, 267, 4 Pac. 919, 10 Pac. 674; *Marsh v. Lott*, 156 Cal. 643, 647, 105 Pac. 968.) It follows that a mere delay in commencing suit, short of the period of limitation, need not be excused in the complaint.

We take it to be the position of the claimants, however, that this is not a case of mere delay in bringing suit, but a case [7] wherein relief is sought from a mistake, the failure to discover which is itself an affirmative showing of laches. The argument is this: The mistake pleaded is one of law; the means of discovery were presumptively present and were available at all times; discovery must, therefore, be imputed from the moment the mistake was made, or negligence must be inferred; if negligence be inferred, that is laches; if discovery be imputed, then the plaintiff did not act promptly as required by section 5065, Revised Codes. In so far as this argument grounds itself upon the conditions existing when the contracts were made, it has been disposed of above. As to subsequent events, the following may be added: Mistakes of law and mistakes of fact are, as possible bases for rescission, *in pari materia*; there is not, either as to the duty of discovery or the time of commencing suit, any distinction between them. As to either, laches may arise from a culpable neglect to discover, but we are not required to impute laches from a delay in discovery for a period of less than nine months merely because the mistake is one of law. Whether a case is or is not one of laches depends upon the circumstances

affecting the party seeking relief as well as the party against whom relief is sought. Where the circumstances are such as to excuse a failure to discover, where also the situation of the parties has not changed, no occasion is offered to apply the doctrine of laches. (*Streicher v. Murray*, 36 Mont. 45, 92 Pac. 36, 59; *Delmoe v. Long*, 35 Mont. 139, 160, 88 Pac. 778.) No change has occurred in the situation of the parties to this suit—at least none to the prejudice of the claimants. The plaintiff could not discover the mistake until she had reason to suspect, at least, that a mistake had in fact been made. Nothing in the evidence suggests such a reason, and many things are shown by which any misgivings she might have entertained were wholly allayed. The prompt action required by section 5065 is after discovery, and in this she was not delinquent. If the circumstances of this case do not suffice to avoid the claim of laches, then the statute is meaningless, so far as allowing relief from mistake of law is concerned.

3. Save as an aid in determining the duty of the plaintiff to make or offer restoration, the question of consideration cannot be deemed of great importance. Consideration is present in practically every contract sought to be rescinded for mistake and is not of itself any obstacle to rescission. The real question arises [8] under sections 5065 and 6113, Revised Codes, which provide that the party seeking rescission must restore or offer to restore everything of value received by him from the other party, and that rescission cannot be had for mere mistake unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made. We do not think the complaint is deficient in respect of these requirements. It alleges that the plaintiff received nothing of value from the claimants under the contract sought to be rescinded; and, of course, if she received nothing there was nothing to restore. This general allegation is not necessarily negatived by the admission that the claimants joined in the transfer to Wolvin as contemplated by Exhibit "A," because, according to the complaint, they were strangers to the title and their assent

was, *prima facie*, not an article of value. The facts are that the purchaser directed his attorneys to see that all persons whose assent might be requisite to good title should join in the conveyances. These attorneys happened to be the firm representing the estate of Henry Brundy, which was known and satisfactory to both clients. The particular attorney in charge of his work was Mr. Louis P. Sanders, also in direct charge of the Brundy estate. To secure accurate information concerning the heirs of Henry Brundy, Mr. Sanders consulted Stephen D. Sexton, one of the claimants and spokesman for them. As the result of that consultation Mr. Sanders became convinced that there were grandsons and granddaughters who would be entitled to inherit and whose assent was therefore necessary to a good conveyance to Wolvin. This and this alone is the reason, so far as the purchaser was concerned, for exacting the concurrence of the claimants. Mrs. Brundy, on the other hand, desired the property to be sold, as they did, and she, believing them to be heirs whose assent was necessary to the transfer, agreed to waive her supposed dower in their supposed half, for such assent legally expressed. All Wolvin wanted was good title, and but for the mistakes referred to and for which the claimants were in part responsible, the sale could have been accomplished without their intervention. Under these circumstances, it is difficult to see how they gave anything of value to her which it could be her duty to return.

Whether the rule that rescission cannot be had for mere mistake unless the party against whom it is adjudged can be re-[9] stored to substantially the same position as if the contract had not been made, has any application to the instant case depends upon what change in the position of the claimants was worked by their joining in the Wolvin sale. They contend that the lease option and the deed to Wolvin, as well as the contract for Simmons' compensation, imposed liabilities upon them from which they are not relieved by the cancellation of Exhibit "A." As to the Simmons memorandum, this is manifestly not the case. So far from expressing any personal undertaking to pay Sim-

mons, its effect is to authorize the depository to pay certain sums to him out of the Wolvin installments as received, with the specific stipulation that in case of Wolvin's failure, Simmons waives all further claims and no attempt to affect this feature is involved in this case. The same conclusion must be reached as regards the lease option. It had a dual purpose, *viz.*: To put Wolvin into possession pending the completion of his purchase, and to provide for delivery to him of a deed in form sufficient to pass title to the property. As to neither can the claimants be at all endangered, because the former has been accomplished, and the latter will occur automatically when the payments are made, the deed having been deposited in escrow for the purpose.

The property sold consisted of mining claims. The deed contains no express warranties, and the only liability which could possibly arise from it against anyone is for the breach of the warranties implied by law from the use of the word "grant," *viz.*: complete title and freedom from encumbrances. So far as the claimants are concerned, this liability is purely theoretical. An effort on the part of Wolvin to proceed as against them would be effectively met by the fact—admitted by him, adjudged as to them—that they joined in the deed through his and their mistake. Their counsel suggest that assuming no right in them, they still stand as guarantors for Mrs. Brundy; but no intention to act in any such capacity can be implied from the deed or existed in fact. The whole doctrine of restoration is equitable and requires merely that the party against whom rescission is adjudged shall be no worse off than before the contract. The bare possibility that they, instead of the real and efficient grantor, may be sued by Wolvin on account of the property—a possibility shared by all mankind and without hope of fruitful result to him—is not a substantial change in their position.

The claimants contend that because Exhibit "A" recites one [10] dollar to have been paid by them to the plaintiff, it was necessary for her to allege and prove an offer to return the payment so made. This might be correct under some circumstances; but the complaint avers the receipt by the claimants of \$4,750

justly belonging to her. Under these conditions she was not obliged to offer back the dollar even if its receipt by her had not been denied. A money consideration need not be returned where, in case of a decree in favor of plaintiff, the defendant would be required to account for a greater sum. (*Arnold v. Frazer*, 43 Mont. 540, 117 Pac. 1064; *Wilson v. Moriarity*, 77 Cal. 596, 20 Pac. 134.)

Notwithstanding the rather vigorous argument to the contrary, it is quite apparent that the dollar recited in Exhibit "A" was never paid. Sexton says he did not pay it, and he, as the representative of the claimants at that particular time and for the particular purpose of closing the transaction, is the person by whom it should have been paid; Allen says he did not receive it, and he, as the representative of the plaintiff, is the person to whom payment would naturally have been made. It is true that Mrs. Brundy, whose examination was for humane reasons obviously restricted to essentials, did not testify on the subject and it is possible, of course, that she received the dollar from the claimants through some other channel; but such bare improbable possibilities rendered still more improbable by the [11] circumstances under which the papers were signed by her, need not be considered. Nor, if the dollar had been paid, would the court have been authorized to dismiss the suit and confirm the claimants in their accession to property worth approximately \$90,000, merely because its return had not been formally offered. *De minimis non curat lex*. Restoration is not a condition to the right to sue but to have the relief, and the court, with the entire matter before it, may direct as a condition to the relief whatever restoration equity requires.

Contention is also made that some expenditures were made on the part of the claimants, by Stephen D. Sexton, in procuring their assent to the transactions in question. These, of course, were matters proper to be shown in defense to aid the court in completely determining the rights of the parties. In the absence of any proof of the amount of such expenditures, they could not be considered, assuming them to be otherwise allowable.

4. The claim of estoppel is based upon two grounds: The first is the alleged acceptance of benefits under the contracts in [12] question, that is, the receipt by the plaintiff of one-half the moneys paid on the Wolvin purchase. The record does not disclose that she received anything after learning the facts which entitle her to rescind. The character of estoppel relied on is estoppel *in pais*, and that arises only when one party has by his words or conduct misled the other to the disadvantage of the latter. That is not the situation here. Plaintiff was entitled to all the proceeds of the Wolvin sale; she took what was unquestioned, the balance being withheld from her on account of the contracts but without true legal warrant. Her situation is assimilated to that of the defendant in *Rausch v. Rausch*, 14 Mont. 325, wherein this court said: "There is no principle of estoppel to bar defendant, under the conditions shown in this case, from asserting her right to said property. If so, then she is estopped by having suffered wrongs, * * * and the law of estoppel, so operating, would augment her injury. Such is not the office of estoppel. It is interposed against guilty conduct to prevent imposition, deception and injury to others acting in good faith in reference to the same subject. Nor does it appear, that any disadvantage resulted to plaintiff from the events recited."

The second ground of estoppel is that on the day after the papers were executed and deposited in the bank, Stephen D. Sexton attempted to recall the papers and avoid the whole transaction because of some minor fault found by him with the proceedings having nothing whatever to do with the supposed rights of the parties. This attempt was frustrated by counsel and by the administrator, a small monetary concession being made to Mr. Sexton. It is to be noted that all parties were at this time [13] still laboring under the mistake which gave rise to the contracts. It is elementary law that no act which, if done with full knowledge of one's rights, would constitute an estoppel by ratification, can have that effect when done in ignorance or

under the influence of the same mistake as induced the contract sought to be rescinded.

5. Specific exception is taken to certain findings and to the refusal of certain others proposed, which are not strictly within [14,15] the range of the above discussion. None of these findings which were made are necessary to the decision. As to them it may be said that while they are supported by more or less evidence, to determine its legal sufficiency in each instance would be useless, because the judgment would still stand though all of them were unwarranted. (*Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203, 565.) Whether the claimants are entitled to a review of their refused proposals is a serious question, considering the state of the record. As there are, however, substantial reasons for the action of the trial court, we will proceed to state them; By proposals I and XIII, the court was asked to find upon matters touching which there was no issue. Error cannot be ascribed for this. (*O'Brien v. Drinkenberg*, 41 Mont. 538, 111 Pac. 137.) Proposals VIII and XVII sought findings to the effect that no duress or fraud had been practiced upon [16] the plaintiff to induce her to execute the contracts. Duress is not even suggested by the pleadings, and fraud was negatived by the positive and incompatible finding of mutual mistake. Proposal No. XII was, in effect, a request to find that plaintiff's mistake and her continuance therein were due to her inexcusable negligence—a conclusion not necessitated by the evidence. Proposal XV, that Stephen D. Sexton did not represent the other claimants except to deliver the papers on July 11, 1912, is the exact opposite to the court's finding No. 10; there was ample evidence, in our judgment, to support the finding as made, and ample warrant therefore to reject its opposite. Proposal XVIII, "that before he advised the plaintiff to execute the said papers, Allen had been advised concerning the laws of Montana governing succession," is elusive. If it means that Allen was correctly advised, it is without warrant in the evidence and is opposed to the true facts as found by the court. If it means anything else, it was either a repetition of facts found or was immaterial.

6. The decree adjudges that the appellant Canby, who is the attorney in fact of the claimants and who still retains the moneys paid over for them under Exhibit "B," pay to the plaintiff the sum of \$4,500, with interest from January 4, 1914. While this portion of the decree is made the subject of special argument in the brief of claimants, such argument is based upon the proposition that rescission of Exhibit "A" and reformation of Exhibit "B" are impossible. As, in our view, such a result is not impossible, but is commanded by the record, this feature of the decree may be regarded as part of the restoration of the *status quo*, and no fault can properly be found with it.

Upon the whole case we are satisfied that justice was done—and this without error prejudicial to anyone. The judgment and order appealed from are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

CHENOWETH, RESPONDENT, v. GREAT NORTHERN RY.
CO., APPELLANT.

(No. 3,491.)

(Submitted March 29, 1915. Decided April 12, 1915.)

[148 Pac. 330.]

Personal Injuries—Master and Servant—Railroads—Excessive Damages—New Trial—Codefendants—Peremptory Challenges—Notice of Appeal—Service—Inconsistent Pleadings.

Appeal—Modified Judgment.

1. Where the district court on motion for new trial modified the judgment in a personal injury action, by sealing the verdict, with the consent of plaintiff, the judgment as modified superseded the original one, and an appeal from the latter did not lie.

Personal Injuries—Codefendants—Contribution.

2. As between codefendants charged with negligence in which both participated, resulting in personal injuries to plaintiff, the doctrine of
50 Mont.—81

contribution does not apply in favor of the one against whom judgment was rendered.

[As to contribution between persons liable for negligence, see note in 16 Am. St. Rep. 254; Ann. Cas. 1913B, 938.]

Same—Codefendants—Dismissal as to One—Parties—Notice of Appeal—Service.

3. After dismissal of one of two defendants on motion for nonsuit, the defendant so dismissed was no longer a party to the action, and service of notice of appeal upon it by the other defendant was unnecessary.

Same—Codefendants—Peremptory Challenges.

4. Under *Mullery v. Gt. Northern Ry. Co.*, ante, p. 408, the contention that each of two corporation defendants in a personal injury action was entitled to four peremptory challenges of jurors held without merit.

Same—Peremptory Challenges—Waiver.

5. Where codefendants, though antagonistic to each other, do not separately attempt to exercise their right to peremptorily challenge the jurors in turn with the plaintiff, they waive their right in this respect.

Inconsistent Pleadings—Rule.

6. To make pleadings objectionable as inconsistent, they must be so far contradictory that if the allegations supporting one theory are true, those supporting the other must of necessity be false.

Personal Injuries—Excessive Damages—New Trial.

7. *Held*, that damages allowed a carpenter's helper, twenty-eight years of age, capable of earning \$1,000 per year, to the amount of \$15,000 after reduction by the court, on motion for new trial, from a verdict of \$25,000, for the loss of his right arm, where the jury were neither advised of his life expectancy nor the cost of an annuity equal to his earnings, and were confined by the instructions to a consideration of the pain and suffering incident to the injury and the depreciation of his earning capacity, were so excessive as to evince passion or prejudice, and therefore to require a new trial.

Excessive Verdicts.

8. In determining whether a verdict is so excessive as to show passion or prejudice on the part of the jurors, the time devoted to the consideration of the case by them, though not decisive, may be taken into account.

[As to when verdict for personal injuries is excessive, see note in Ann. Cas. 1913A, 1361.]

Appeal from District Court, Cascade County; H. H. Ewing, Judge.

ACTION by Jay H. Chenoweth against the Great Northern Railway Company and the Anaconda Copper Mining Company. From a judgment for plaintiff and an order denying it a new trial, defendant railway company appeals. **Reversed.**

Messrs. Veazey & Veazey, for Appellant, submitted a brief; *Mr. I. Parker Veazey, Jr.*, argued the cause orally.

Mr. S. A. Anderson, Mr. W. F. O'Leary and Mr. James A. Walsh, for Respondent, submitted a brief; *Mr. Walsh* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was brought against the Great Northern Railway Company and the Anaconda Copper Mining Company to recover damages for personal injuries sustained by the plaintiff while working in the smelter at Great Falls. A motion for nonsuit by the mining company was sustained at the close of plaintiff's case.

As against the railway company, the complaint charges negligence in coupling a locomotive to empty cars at the place where plaintiff was engaged in the performance of the duties of his employment, in such a careless and violent manner that the cars were driven eastward and upon the plaintiff, injuring his right arm to such an extent that amputation was necessary. It is also charged that it was the duty of the railway company to give plaintiff due warning that the cars were about to be moved, and in failing in this respect the company was negligent. The answer of the railway company denies the material allegations of the complaint and pleads contributory negligence and assumption of risk. In selecting a jury the court called upon plaintiff and defendants to challenge peremptorily, and plaintiff exercised his first. The mining company then dismissed a juror, and this procedure was followed upon the call of the court for the second, third and fourth challenges. The railway company then advised the court for the first time that it was unable to agree with its codefendant as to jurors to be excused, and demanded that it be permitted to exercise four peremptory challenges. Upon the refusal of this demand it requested to be permitted to excuse a particular juror then in the box, but this request was likewise denied. A verdict for \$25,000 in favor of plaintiff and against the railway company was returned and judgment entered thereon. Upon consideration of a motion for a new trial,

the court made a conditional order for a reduction of the amount of the verdict to \$15,000, and plaintiff having complied with this order, the judgment was modified accordingly and a new trial denied. The railway company has attempted to appeal from the judgment for \$25,000, and has appealed from the judgment for \$15,000 and from the order denying it a new trial. Plaintiff has moved to dismiss the appeals on the ground that the mining company was not served with the notice of appeal.

1. The judgment for \$25,000 was not in existence at the time [1] the appeals were taken. It had been superseded by the modified judgment for \$15,000, and the attempt to appeal from the judgment as originally entered is therefore abortive.

2. We are unable to understand upon what theory the railway company could avail itself of the exception reserved to the order dismissing the mining company from the case, even if it desired to do so. The doctrine of contribution has no application to a case of this character. (*Tanner v. Bowen*, 34 Mont. 121, 115 Am. St. Rep. 529, 9 Ann. Cas. 517, 7 L. R. A. (n. s.) 534, 85 Pac. 876; *Rand v. Butte Electric Ry. Co.*, 40 Mont. 398, 107 Pac. 87.) The defendants were not charged as joint tort-feasors in the sense of the term employed in *Forsell v. Pittsburgh & Mont. Copper Co.*, 38 Mont. 403, 100 Pac. 218, but were charged with negligence in which both participated. In such an action the failure to fix liability upon one, does not militate against plaintiff's right to recover against the other. (*Golden v. Northern Pac. Ry. Co.*, 39 Mont. 435, 18 Ann. Cas. 886, 34 L. R. A. (n. s.) 1154, 104 Pac. 549.) If the railway [3] company was guilty of negligence which proximately caused plaintiff's injury, the fact that the mining company was or was not negligent could not enhance or diminish the railway company's liability. Having secured its dismissal upon motion for nonsuit, the mining company was not thereafter, an adverse or any other kind of party to this action. Its interests could not be prejudicially affected by a reversal as to the railway company, and service of notice upon it was therefore unnecessary.

3. The decision in *Mullery v. Great Northern Ry. Co.*, ante, [4] p. 408, 148 Pac. 323, is decisive against appellant's claim that it should have been allowed four separate peremptory challenges. If the railway company and the mining company were antagonists, that fact should have been brought to the attention of the court when peremptory challenges were first called for. By remaining silent until the plaintiff and the mining [5] company had exercised the statutory number of challenges, the railway company acquiesced in the selections made by its codefendant. If entitled to separate challenges at all, it could exercise them only by alternating with plaintiff (*State v. Sloan*, 22 Mont. 293, 56 Pac. 364), and its failure to challenge in turn with the plaintiff constituted a waiver of its right. (*State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169.)

4. A special demurrer for ambiguity and uncertainty in the complaint was not interposed, and these defects cannot now be urged upon our attention. (Rev. Codes, sec. 6539.) While the [6] two theories upon which plaintiff predicated his right to recover are somewhat inconsistent, they are not so far contradictory that if the allegations supporting one are true, the allegations supporting the other must of necessity be false; and this is the standard by which inconsistent pleadings are to be measured. (*Johnson v. Butte & Superior C. Co.*, 41 Mont. 158, 48 L. R. A. (n. s.) 938, 108 Pac. 1057; *Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714.)

5. It is insisted that the damages are excessive and appear to have been awarded under the influence of passion or pre-[7] judice, and with this we agree. Of necessity, there cannot be any hard-and-fast rule established for determining the maximum compensation to be allowed for a personal injury, and the courts are therefore ever reluctant to interfere. But while the amount of recovery in the first instance is committed to the wise discretion and unbiased judgment of the jurors, the Codes have provided for a review by the trial and appellate courts. Section 6794 specifies seven grounds for any one or more of which a new trial may be had. The fifth is: "Excessive damages,

appearing to have been given under the influence of passion or prejudice." In addition to the remedy by new trial, there is available to the defeated party the right to insist that the amount of the verdict be reduced by the court. This principle has become so firmly established in the jurisprudence of our country that it may well be said to be a part of the American common law. It is a serious question whether a court should ever resort to this latter remedy, except in a case where the amount of the excess can be accounted for by resort to mathematical calculation based upon some error in the standard adopted by the jury. If the amount of the excess cannot be ascertained by some rational method other than the mere *ipse dixit* of the court, a new trial should be granted; for under our judicial system the rights of parties are submitted to the fair and impartial judgment of jurors, not to their passions or prejudices. Whenever it becomes apparent that either or both of these impulses influenced the amount of a verdict, it is the duty of the court to see that a tribunal created to secure justice is not perverted from its purpose and made an implement of oppression.

The object of section 6794 is to secure to litigants fair and impartial trials of their controversies. The statute is silent with respect to the means by which passion or prejudice may be shown. The courts have generally contented themselves with a comparison of the amount of the particular verdict with the extent of the injuries shown. The jurors are not permitted to impeach their verdict by disclosing the proceedings in the jury-room, from which passion or prejudice might be inferred (*State v. Beesskove*, 34 Mont. 41, 85 Pac. 376); and unless the amount of the verdict, when taken into consideration, with the surrounding facts and circumstances ordinarily available to the defeated party discloses the presence of these elements, then subdivision 5 of section 6794 is a dead letter. In the present instance we are relieved of much of the embarrassment usually surrounding the solution of like questions. The issues were narrowed in the lower court to very restricted limits. In the complaint the plaintiff alleges that at the date of his injury he was twenty-

eight years old, able-bodied and capable of earning \$1,000 per year. In the instructions submitted the jurors were confined to a consideration of two elements of damages only: pain and suffering incident to the injury, and impairment of earning capacity. The life expectancy of plaintiff was not shown; the mortality tables were not used; the cost of an annuity equal to plaintiff's earning capacity was not before the jury. There was not any medical expert testimony, and no evidence of any injury other than the loss of the arm. Since neither party objected to instruction 15 referred to above, we are not called upon to determine whether it is correct. It became the law of the case binding upon the parties and the jury. The elements of personal disfigurement; the inconvenience in going through life in the maimed condition in which the plaintiff unfortunately finds himself, or his unfavorable situation in competition with others in attempting to enter a new field of employment, could not have been considered by the jury under the instruction above. Neither were the jurors called upon to weigh conflicting opinions of expert witnesses as to accompanying injuries, nor to consider the many difficult questions which ordinarily surround a case of this character. They were confined in their deliberations to ascertaining an amount which would reasonably compensate plaintiff for the pain and suffering incident to his injury, and for the depreciation of his earning capacity. The plaintiff's own testimony precludes allowance of any considerable sum on account of pain and suffering; and substantially the entire award of \$25,000 must be accounted for, either upon the theory that plaintiff's earning capacity has been diminished to an extent commensurate with that amount, or that the jurors were swayed by the influence of passion or prejudice. Plaintiff is a barber by trade. He has done some work as a pipe-fitter, and at the time of his injury was working as a carpenter's helper. Twenty-five thousand dollars invested at the modest rate of four per cent will yield an annual income equal to plaintiff's earnings, leaving to his heirs at the time of his death the entire principal sum intact. Any higher interest rate would only accentuate the

disproportion between the amount of this verdict and fair compensation for the impairment of plaintiff's earning capacity. Assuming that plaintiff's capacity to earn has been destroyed altogether—and the evidence does not warrant such conclusion—still the amount returned by the jury is out of all proportion to the injury when viewed from the standpoint of compensation for loss of earning capacity, and far in excess of any verdict ever sustained for a like injury to a man similarly situated, so far as disclosed by the reported cases called to our attention. These cases need not be reviewed. They are useful only as indicating a consensus of opinion as to what constitutes fair compensation for a personal injury under a given set of circumstances. Reference may be had to *Cleveland, C., C. & St. L. Ry. Co. v. Hadley*, 16 Ann. Cas. 1, [170 Ind. 204, 16 L. R. A. (n. s.) 527, 82 N. E. 1025]. The Workmen's Compensation Act, passed by the fourteenth legislative assembly, and effective July 1 of this year, fixes a maximum compensation of \$2,000 (exclusive of the cost of certain medical attendance, etc.) for the loss of "one arm at or near shoulder." This provision is not conclusive nor very persuasive upon the question of reasonable compensation. It indicates in a measure, at least, the views of a majority of the legislators upon the subject, and, when in operation, will control in all cases subject to the Compensation Act.

While the time devoted to a consideration of this case by the jury is not decisive, we do not share the opinion of some courts [8] that it cannot be considered at all. It is worthy of note, we think, as indicating the existence of some extraneous influences, that though this case presented some difficult problems for solution, and though the trial court submitted twenty-nine instructions, some of which of necessity were involved and demanded painstaking consideration, the jury returned this verdict for \$25,000 within thirty minutes from the time the case was submitted to them. The trial court determined that the verdict is excessive and plaintiff has acquiesced in that conclusion by offering to remit \$10,000 from the amount. We think it impossible, under the circumstances, to account for the excess

—whatever it may be—upon any rational theory consistent with the theory that the jurors exercised that calm and deliberate judgment demanded in the trial of jury cases. If the facts of this case do not disclose that the jurors were influenced by passion or prejudice, we think it impossible to make out a case which falls within the purview of subdivision 5 of section 6794 above.

If, then, passion and prejudice swayed the jurors, there was not a fair and impartial trial, and, instead of reducing the verdict, the lower court should have granted appellant's motion, to the end that the case may be once submitted to the unbiased judgment of jurors selected to administer justice between these parties.

The attempted appeal from the judgment as originally entered is dismissed; the motion to dismiss the appeals is overruled; the judgment and order are reversed and the cause is remanded for a new trial.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.



MILWAUKEE LAND CO., APPELLANT, v. RUESINK ET AL.,
RESPONDENTS.

(No. 3,489.)

(Submitted March 29, 1915. Decided April 13, 1915.)

[148 Pac. 396.]

*Real Property—Ejectment—Sale—Oral Agreement—Statute of
Frauds—Assignment—Forfeitures—Pleading and Proof—
Variance—Tender—Nonconflicting Evidence—Review—Find-
ings—Appeal and Error.*

Appeal and Error—Evidence Without Conflict—How Viewed.

1. Where the evidence presents no substantial conflict, questions of fact are eliminated and the remaining questions of law may be determined as upon an agreed statement of facts.

District Court—May Direct Verdict, When.

2. If the evidence in a jury case is such that reasonable men can come to but one conclusion thereon, the court may direct a verdict in favor of the party entitled to it, or withdraw the case from the jury and render judgment.

Same—When Formal Findings Unnecessary.

3. In a case tried without the aid of a jury, the evidence justifying but one conclusion, the court need not make formal findings even though request be made for them.

Appeal and Error—Defective Findings—Nonconflicting Evidence—Review.

4. Where, in a case of the character referred to in paragraph 3, *supra*, the court makes findings, defects in them, though excepted to, do not call for a reversal of the judgment, but will be ignored and the conclusion of the trial court reviewed upon an examination of the whole of the evidence in the record.

Same—Record—New Trial—Nonconflicting Evidence—Duty of Judge Called in.

5. A district judge called in to determine a motion for a new trial asked for, among other grounds, because of the alleged insufficiency of the evidence to justify the findings of the trial judge, under the circumstances detailed in paragraphs 3 and 4, *supra*, was required to determine, not whether the evidence was sufficient to warrant any particular finding, but whether the final conclusion, in view of the evidence in the printed record, was justified.

Real Property—Sale—Oral Agreement—Statute of Frauds.

6. Where a contract for the sale of land rested upon an oral agreement, a part payment of the purchase price, the assumption of possession by the vendee and the erection of buildings and other improvements thereon with the knowledge and consent of the vendor, followed by a tender of the balance of the purchase money, constituted such part performance as took it out of the operation of the statute of frauds.

[As to part performance of contract within statute of frauds, see notes in 32 Am. Dec. 129; 53 Am. Dec. 539.]

Same—Contracts—Assignment.

7. Assignability of contracts being the rule and nonassignability the exception, in the absence of a stipulation to the contrary in an oral agreement to sell land, the right conferred by it was assignable.

Same—Ejectment—Pleading and Proof—Immaterial Variance.

8. Where, in an action in ejectment, defendants relying upon a contract for the sale of the premises, the evidence though not technically corresponding to the allegations of the answer, did support them in their general scope and meaning, the divergence relating to the mode and time of payment of the final installment of the purchase money only, a finding in favor of plaintiff on the ground of variance was error.

Same—Forfeitures—Duty of Vendor.

9. After the vendor of land had extended indulgence to the vendee in the matter of making payment of installments until the last one fell due, he could not declare a forfeiture without tendering a conveyance or accompanying the demand for payment with an offer to convey.

Same.

10. Under a contract of sale, the obligation of the vendor to convey title—then in the United States—was concurrent with the vendee's obligation to pay the balance of the purchase price remaining

unpaid; hence until the former had acquired title and tendered or offered a conveyance, he was not in a position to terminate the contract for failure to pay the last installment.

Same—Contract—Assignment—Right of Partner.

11. Where a firm was the owner of a right to have title to realty conferred to it, one of its members could rightfully make an assignment thereof while the partnership was in existence; if in process of liquidation, the assignment was good also, under section 5502; and if not authorized to act as liquidating partner, it was valid where the assignee paid value relying upon the credit of the firm and the consideration was devoted to its benefit.

Same—Tender—What may Constitute.

12. Where the assignee of a contract of sale of land has forwarded a draft to a director of plaintiff corporation—the vendor—to be used to pay the balance due, who, at the time the assignee filed his answer in an action in ejectment, still retained it, the allegation that defendant was willing that plaintiff should retain it in payment of such balance, together with the fact that at the trial it was deposited with the clerk, constituted a tender of the amount due and a payment of it into court for plaintiff's benefit.

[As to sufficiency and effect of tender, see notes in 77 Am. Dec. 470; 30 Am. St. Rep. 460.]

Appeal from District Court, Custer County; C. C. Hurley, Judge.

ACTION by the Milwaukee Land Company against Ira Ruesink and John Anderson. Judgment for plaintiff. From an order sustaining defendants' motion for a new trial, plaintiff appeals. Affirmed.

Mr. Geo. W. Farr and *Mr. H. H. Field*, of Counsel, submitted a brief and one in reply to that of Respondents; *Mr. Farr* argued the cause orally.

Defendants' defense rests primarily upon the determination of the one question as to whether or not there was in fact any such contract as was pleaded by him in his answer, that a specific performance thereof could be decreed. The term "specific performance" presupposes the existence of a contract or agreement. Specific performance is an equitable remedy by which a party to a contract is compelled to do the very acts which he has undertaken to do. (*Rison v. Newberry*, 90 Va. 513, 18 S. E. 916.) "The bill of complaint must properly allege the execution or making of the contract; and the essential terms of the contract must be alleged with distinctness and certainty, and

not left to inference. The bill or complaint must state facts which would be sufficient, upon a default, to enable the court to draft its decree from the averments." (36 Cyc. 774.) The allegations of the counterclaim are insufficient, by reason of not being sufficiently definite or certain. (*Duff v. Fisher*, 15 Cal. 375; 20 Ency. Pl. & Pr. 435.) "Where the bill is ambiguous, its averments will be taken most strongly against the complainant." (*Id.* 436.) There must be no substantial variance between the contract averred in the complaint and the contract proved by the evidence. The ruling has been stated, in even stronger terms, and it has been said, "that the plaintiff must prove the identical contract alleged." (*Id.* 44.)

Ramsland did not have any authority to bind the company by an oral contract for the sale of its land. This situation alone is sufficient to dispose of the defendants' whole case, for before they can have a decree of specific performance of a contract, either oral or written, it must be a valid contract. (36 Cyc. 543; *Jennings v. Brown*, 20 Okl. 294, 94 Pac. 557; *Bradley v. Haven*, 208 Mass. 300, 94 N. E. 268.) The proof necessary to establish a parol contract for the sale of land must be clear and convincing. A mere preponderance of the evidence will not suffice. The contract must be certain and definite. (*Rice v. Rigley*, 7 Idaho, 115, 61 Pac. 290; *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225; *Foster v. Maginnis*, 89 Cal. 264, 26 Pac. 828; *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Robbins v. McKnight*, 5 N. J. Eq. 642, 45 Am. Dec. 406; *Hudson v. Layton*, 5 Harr. (Del.) 74, 48 Am. Dec. 167; *Johnston v. Glancy*, 4 Blackf. (Ind.) 94, 28 Am. Dec. 45; *Wagonblast v. Whitney*, 12 Or. 83, 6 Pac. 399; *Purcell v. Coleman*, 4 Wall. (U. S.) 513, 18 L. Ed. 435; *De Sollar v. Hanscome*, 158 U. S. 216, 39 L. Ed. 956, 15 Sup. Ct. Rep. 816; *O'Connor v. Jackson*, 23 Wash. 224, 62 Pac. 761; *Brown v. Brown*, 33 N. J. Eq. 650; *Semmes v. Worthington*, 38 Md. 298; *Van Wert v. Chidester*, 31 Mich. 207; *Banks v. Weaver* (N. J.), 48 Atl. 515.)

One partner has no right to execute a deed in the name of the partnership, or to convey the interests of the other copartner

in the copartnership real estate unless the other partner gives his consent thereto and confers power upon him so to do by an instrument in writing. (Story on Partnership, sec. 120; 1 Am. & Eng. Ency. of Law, 960.) Partners are as tenants in common of partnership real estate and a deed by one of the partners does not convey the interest of the other partner not joining in it. (*Alabama Marble etc. Co. v. Chattanooga M. & S. Co.* (Tenn.), 37 S. W. 1004.)

Messrs. Tisor & McKinnon, for Respondents, submitted a brief; *Mr. C. R. Tisor* argued the cause orally.

Where possession taken in pursuance of a contract, is followed by the making of valuable improvements on the land by the vendee, there is a sufficient part performance according to the rule in nearly all jurisdictions. These acts, as a usual thing, satisfy both tests of part performance, since they indicate, by themselves, that a contract relating to the specific land has been made, and since they frequently, if not generally, involve a change of condition on the vendee's part which could not adequately be compensated in damages if specific performance were not refused. (36 Cyc. 655; *Calanchini v. Branstetter*, 84 Cal. 249, 24 Pac. 149; see note, 3 L. R. A. (n. s.) 790; *Hunt v. Hayt*, 10 Colo. 278, 15 Pac. 410; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805; *Wright v. Brooks*, 47 Mont. 99, 130 Pac. 968; *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586; *Pomeroy on Contracts*, p. 164.) In *Bigler v. Baker*, 40 Neb. 325, 24 L. R. A. 255, 58 N. W. 1026, it was held that when the vendor in a parol agreement for the sale of land puts the purchaser in possession, and the latter, while holding out such agreement makes lasting and valuable improvements upon the premises, such facts amount to a performance of the contract by him.

The plaintiff recognized a contract existing between itself and Way & Ratchford, and also the defendant, John Anderson, as their assignee, and under the well-defined principle of law, the plaintiff cannot now, after having received benefits under

the contract and recognized the same by their conduct, be heard to take an inconsistent position. Where one having the right to accept or reject a transaction takes and retains funds thereunder, he becomes bound by the transaction, and cannot avoid its obligation or effect by taking a position inconsistent therewith. (16 Cyc. 786.)

There was a valid assignment to the defendant, John Anderson, upon which he is entitled to a decree of specific performance. The assignment was made in the name of the firm by one of the members of the firm and for the purpose of which it was executed, and it is sufficient. (*McNeal Pipe etc. Co. v. Woltman*, 114 N. C. 178, 19 S. E. 109; *Edwards v. Spalding*, 20 Mont. 54, 49 Pac. 443; *Wright v. Brooks*, 47 Mont. 99, 130 Pac. 968.) In the *McNeal Case*, *supra*, it is held that a trust deed under seal executed in the name of the firm by one of the partners is binding on the firm as a contract, although not as a deed. The above authorities are applicable to this question and the authorities cited by counsel for appellant on this point are inapplicable, for the reason that no deed was executed or attempted to be executed by Way & Ratchford to John Anderson, the defendant.

There was no forfeiture of the contract by plaintiff. Where time is not the essence of the contract or strict compliance as to time of performance by the purchaser has been waived, the vendor is not entitled to rescind for default of the purchaser in performance without first tendering a deed and demanding performance by the purchaser. (39 Cyc. 1375.) Where time is or is not the essence of the contract, if the vendor has waived strict compliance with its terms, as regards time of payment, he cannot thereafter rescind or forfeit the contract without notifying the purchaser of his intention to do so, unless payment is made and allowing him a reasonable time for performance. (39 Cyc. 1384; *Boone v. Templeman*, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947; *McCroskey v. Ladd*, 96 Cal. 455, 31 Pac. 558; *Russ Lumber etc. Co. v. Muscupiabe Land etc. Co.*, 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995; *Underwood v. Tew*, 7 Wash. 297, 34 Pac. 1100; *Gorham v. Reeves*, 3 Ind. 83.) The same is true

where the delay has been in completing the payments, provided there has been no substantial change in the circumstances and relations of the parties during the interval, and the interest will constitute not only a theoretical but an actual compensation for the purchaser's default in payment. Again, if the vendee takes and retains possession of the premises with the vendor's consent, mere delay in bringing suit, or even in paying the price, will not prevent him from compelling a conveyance upon a subsequent payment or tender of the amount due; nor will his right to the relief be cut off until the vendor places a time-limit to payment at or before a specified day and notice is given that the agreement will be rescinded unless the demand is complied with. (*Bennie v. Becker-Franz Co.*, 14 Ariz. 580, 134 Pac. 280; *Gray v. Pelton*, 67 Or. 239, 135 Pac. 755.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an appeal from an order granting defendants' motion for a new trial. The action is in ejectment to recover the possession of lot 1, block 4, in the townsite of Baker, Custer (now Fallon) county. The complaint is in the usual form, alleging title and right to possession in plaintiff and ouster by defendants. The separate answer of defendant Ruesink admits that he is in possession, but denies all the other allegations in the complaint. Denying plaintiff's title and right to possession except as admitted in his counterclaim, the defendant Anderson seeks affirmative relief upon these allegations: That during the month of October, 1908, the plaintiff, by and through its duly authorized agent, T. O. Ramsland, entered into an oral contract and agreement with A. S. Way and J. D. Ratchford, copartners doing business under the firm name of Way & Ratchford, by which it agreed to sell and convey to them the lot in controversy for the sum of \$1,000; that the said Way & Ratchford then paid to Ramsland in cash the sum of \$333.35, which the latter accepted as part payment of the purchase price and thereupon delivered to Way & Ratchford a receipt in writing, acknowledging pay-

ment of said sum; that under the contract so entered into, and in consideration of the part payment of the purchase price so made, Way & Ratchford were let into possession of the lot, and by themselves and their assignees have been in possession ever since; that when the contract was made, the plaintiff did not have title to the lot, but expected to obtain it from the United States government; that later, during the month of October, 1908, the plaintiff delivered to Way & Ratchford duplicates of the form of contract used by it in making sales of lots at Baker, in which was recited an acknowledgment of the receipt of part payment of the purchase price to Ramsland, and that it was then understood by Way & Ratchford that the balance of the purchase price should become due and payable when plaintiff received title from the United States, and should be able to convey it to Way & Ratchford; that in January, 1911, Way & Ratchford, for a valuable consideration, transferred to this defendant all their interest in the said lot, and that ever since that time he has been, and now is, in the possession thereof; that while so in possession of the lot, the said Way & Ratchford and this defendant have erected buildings thereon and made other improvements of the value of \$5,000, which cannot be removed without great injury thereto, all of which belong to this defendant by bill of sale executed to him by Way & Ratchford on November 3, 1909; that during the fall of 1910 the plaintiff obtained title to the lot from the United States, and thereafter, on January 21, 1911, this defendant forwarded to the principal office of plaintiff at Seattle, Washington, the balance of the purchase price with interest, in all \$779, together with the duplicates of the contract theretofore delivered to Way & Ratchford, with assignments indorsed thereon by Way & Ratchford to this defendant, and demanded that a deed be delivered to him; that the plaintiff refused to deliver the deed, but retained the said duplicates and assignments, and that it has never offered to return the sum of \$779 to the defendant, and has at all times since refused, and does now refuse, to execute and deliver the deed. It is further alleged that Way & Ratchford and this defendant have com-

plied with all the terms of the agreement to purchase said lot, but that the plaintiff has failed and refused to comply with them; that it has never returned, nor offered to return, the cash payment made by Way & Ratchford when the contract was made, and that defendant has always been ready to have the plaintiff retain the entire amount of the purchase price paid to it, and accept a deed. It is also alleged that Way & Ratchford and this defendant have since the date of the contract been in the occupation of the lot with the knowledge and consent of plaintiff. Demand is made that defendant be decreed to be the equitable owner of the lot and that plaintiff be required to execute and deliver to him a good and sufficient conveyance of the legal title. There is also a prayer for general relief. By reply the plaintiff admits that in the month of October, 1908, it did not have title to the lot, having obtained it, as defendant Anderson alleges, in the fall of 1910. It admits that there are buildings and improvements on the lot and that the defendants are in possession of it. It denies all the other allegations of the counterclaim.

At the opening of the trial a jury was waived, and counsel stipulated in effect that plaintiff would be entitled to recover if defendant Anderson was not, upon the evidence adduced by him in support of his counterclaim, entitled to the relief demanded. The court, Hon. Sydney Sanner presiding, made formal findings and conclusions of law in favor of plaintiff and ordered judgment accordingly. Judge C. C. Hurley, the successor to Judge Sanner, by general order sustained defendants' motion for a new trial.

Counsel for plaintiff open their argument in their brief with this statement: "The question to be determined by the court on this appeal is whether or not there is a decided preponderance of the evidence against the findings and decision of the trial court, and if there is, the order will * * * be affirmed; otherwise not." They proceed upon the assumption that the only question open to consideration by this court is whether, because Judge Hurley did not preside at the trial and could not exer-

cise the discretion ordinarily vested in a trial judge in determining a motion for a new trial (*Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76), he did not err in his conclusion that the evidence preponderates decisively against the findings.

The motion for a new trial was made upon several of the statutory grounds, among them that the evidence was insufficient to justify the findings and that the decision was against [1] law. Apparently these were the only grounds urged at the hearing. There was no substantial conflict in the evidence. This being the condition, the case was stripped of questions of fact, and it remained only for the court to determine the question of law arising upon all the evidence viewed as an agreed statement of facts. (*Helena Nat. Bank v. Rocky Mt. Bell Tel. Co.*, 20 Mont. 379, 63 Am. St. Rep. 628, 51 Pac. 829; *Murray v. Hauser*, 21 Mont. 120, 53 Pac. 99; *State ex rel. Quintin v. Edwards*, 40 Mont. 287, 20 Ann. Cas. 239, 106 Pac. 695.) If a [2] case is being tried to a jury and the evidence is such that reasonable men can come to but one conclusion thereon, the court may, as the case requires, direct a verdict for the party entitled to it, or withdraw the case from the jury and render judgment. (Rev. Codes, sec. 6761; *Consolidated Gold etc. Min. Co. v. Struthers*, 41 Mont. 565, 111 Pac. 152.) So when, as [3] here, the case is submitted to the court without a jury and the evidence justifies but one conclusion, formal findings are unnecessary, though request be made for them in conformity with section 6766 of the Revised Codes. The judgment will not be reversed if the request is disregarded. (*State ex rel. Quintin* [4] *v. Edwards*, *supra*.) For the same reason, if the court makes them, this court will not reverse the judgment because of defects in them, or any of them, though exception has been reserved because of the defects, under section 6767. In such a case this court will ignore the formal findings and upon examination of the whole of the evidence determine whether the conclusion reached thereon by the trial court was correct. In [5] determining the motion as made, therefore, Judge Hurley was in the same position with reference to the evidence as is

this court. (*Gibson v. Morris State Bank, supra.*) He was required to decide, not whether the evidence was sufficient to sustain any particular finding, but whether, in view of the allegations in the answer, setting forth the terms of the contract upon which the defendants rely and the evidence disclosing the result of the negotiations had between Ramsland and Way & Ratchford, and the subsequent events down to the trial, Anderson is entitled to the relief demanded. Though the answer is not a model pleading, yet if the legitimate inferences to be drawn from the evidence justify the conclusion that the contract was made substantially as alleged therein and that Way & Ratchford complied with its requirements, there can be no question that the plaintiff ought to be compelled to convey title to Anderson. Upon this assumption, the decision of Judge Sanner [6] was erroneous and the defendants were entitled to a new trial. True, the contract was left to rest entirely upon the oral agreement. Nevertheless the payment of the cash installment of the purchase price as stipulated, coupled with the assumption of possession by Way & Ratchford with the consent of the plaintiff, and the erection of buildings and other improvements thereon with its knowledge and acquiescence, with the expectation by Way & Ratchford that they would be vested with title as soon as plaintiff acquired it, followed by a tender of the balance of the purchase money, constituted such a part performance of the contract as, under the rule generally recognized, took it out of the operation of the statute of frauds and authorized the court to decree a specific performance of it. (*Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805; *Stevens v. Trafton*, 36 Mont. 520, 93 Pac. 810; *Wright v. Brooks*, 47 Mont. 99, 130 Pac. 968, and cases cited.) Under the assignment by Way & Ratchford to Anderson, the latter was substituted in their stead, and became entitled to such relief as they could demand [7] had the assignment not been made. Assignability of contracts is the rule, nonassignability is the exception. In the absence of any stipulation in the agreement or contract itself to the contrary, the right conferred by it is assignable. (*Flinner*

v. *McVay*, 37 Mont. 306, 15 Ann. Cas. 1175, 19 L. R. A. (n. s.) 879, 96 Pac. 340; *Winslow v. Dundon*, 46 Mont. 71, 125 Pac. 136.)

The evidence shows, and the court found, these facts: On October 29, 1908, T. O. Ramsland was the local special agent of the plaintiff to negotiate sales of lots in the townsite of Baker to which plaintiff had not then secured the legal title. He was not vested with authority in writing or otherwise to complete sales and make conveyances, but all of his negotiations were subject to approval by plaintiff. This was known to Way & Ratchford, as was also the fact that Ramsland's contracts when made were to be embodied in writing, the form of which was to be furnished by the plaintiff. On that date he agreed to sell to Way & Ratchford the lot in controversy for \$1,000, one-third in cash and the balance payable in two equal installments, due, respectively, at the expiration of one and two years thereafter. As soon as the cash payment was made, Way & Ratchford entered into possession of the lot and erected valuable improvements thereon, and by themselves and their assignee, Anderson, have remained in possession with the knowledge and consent of the plaintiff. When the agreement was made, Way & Ratchford knew that the plaintiff had only the equitable title. In due course and within a few days after the completion of the negotiations between Ramsland and Way & Ratchford, and after receipt by the proper officers of the plaintiff of the installment of the purchase money by the latter, the plaintiff had prepared and forwarded to Way & Ratchford in duplicate, for execution, a contract in the form made use of by it in the sale of lots at Baker. The duplicates were intended to be executed by Way & Ratchford and returned to plaintiff. Upon execution by it, one of them was to be delivered to Way & Ratchford, the plaintiff retaining the other. The duplicates were received by Way & Ratchford and retained unexecuted until January 21, 1911, without explanation to the plaintiff. They were never executed by plaintiff. Way & Ratchford did not make the payments of the second and third installments of the purchase

money when they fell due, and after the third fell due they expressly refused to make further payment and so advised the plaintiff, until the plaintiff could convey to them the legal title. They did not thereafter make payment, nor did the plaintiff at any time tender them a deed. On November 3, 1909, the defendant Anderson was put in possession by Way & Ratchford under an incomplete assignment to him of their rights. On January 21, 1911, Ratchford, on behalf of the firm, signed duplicates of the contract and indorsed thereon assignments of all the firm's rights to the lot to Anderson and delivered them to him. He thereupon caused them to be forwarded to the general agent of the plaintiff at Seattle, Washington, with a draft for \$779.00, principal and interest of the two last installments of the purchase money, payable to the agent with a demand for a deed. The demand was refused and the draft returned. On February 4 the draft was forwarded to the vice-president and general manager of the plaintiff, who returned it with a refusal to convey. Thereupon Anderson, through one Lemmon, forwarded the draft to E. D. Sewall, one of the directors of plaintiff, who resided at Chicago. After consulting with the other officers of the plaintiff, Sewall advised Lemmon that the plaintiff would not recognize any right in Anderson. By oversight he failed to return the draft, which remained in his possession unused and unindorsed until the trial. At the time Ratchford made the assignment to Anderson, both knew that the plaintiff had determined to refuse recognition in either of them of any right under the contract of sale. On March 28, 1911, the plaintiff caused to be served upon the defendants formal written notice to vacate the lot and to remove their improvements therefrom. This the defendants refused to do. The payment alleged to have been made at the time of the sale on October 29, 1908, was represented by \$150 in cash and a note for the balance, accepted by Ramaland as cash, which was paid at maturity. The plaintiff received the full amount.

The record discloses these additional facts: Way & Ratchford went into possession immediately and began the erection of the

buildings, which at the date of trial were of the value of \$4,500. The duplicates of the contract were not forwarded to Way & Ratchford until the note was paid. This was ninety days after the sale. At that time the buildings on the lot were in course of construction. While it was understood when the sale was made that the transaction was to be evidenced by a writing executed by the parties, the terms to be embodied in it, other than those fixing the amounts and due dates of the deferred payments, were not discussed nor settled. Why Way & Ratchford did not execute the duplicates, the evidence does not disclose. Apparently the plaintiff, by not requiring the execution of them, was content to let the transaction rest upon the oral contract. In any event, the plaintiff demanded payment of the deferred installments when they fell due. When the last one matured and demand was made for payment, Ratchford informed Ramsland that payment would not be made until the plaintiff could convey title. Though Ramsland knew at this time that the plaintiff had secured title from the government some time early in September, he did not inform Ratchford of this fact; nor did plaintiff then or thereafter tender a deed or demand payment. After the assignments were made to Anderson on January 21, 1911, and tender of the balance due was made by him with demand for a deed, an effort was made by Ramsland, acting for Anderson, to induce the plaintiff to accept payment and deliver the deed. The officers of the plaintiff consistently refused to do so, putting their refusal exclusively upon the ground that they had elected to declare the contract of sale forfeited. The reason why the draft was forwarded to Mr. Sewall after its return from the Seattle office was that Mr. Lemmon, being a mutual friend of Anderson and Mr. Sewall, was of the opinion that Mr. Sewall would act as mediator between Anderson and the company and induce the company to execute and deliver the deed. This result, as the findings show, he failed to accomplish.

Mr. Sewall testified that he had retained the draft by oversight, having inadvertently put it in his letter files with the letter from Mr. Lemmon in which he received it, and that when

this controversy arose and it became necessary to examine his correspondence, he found it and delivered it to plaintiff's counsel. At the trial it was introduced in evidence and filed with the clerk. When Anderson went into possession on November 3, 1909, he did so under a bill of sale executed to him by Way in the firm name of Way & Ratchford. This covered the buildings and improvements only. The reason why the execution of the formal assignment was deferred was that the consideration had not been fully paid until the date of its delivery. The purpose of the assignment was to vest Anderson with the equity of the firm of Way & Ratchford, and to put Anderson in position to demand a deed from plaintiff. The consideration paid went into the assets of the firm. The plaintiff was fully informed of Anderson's claim as early as October 19, 1910. During the latter part of December its general manager informed Anderson that it had elected to terminate the contract for failure of Way & Ratchford to pay the balance of the purchase price. No offer was made by Anderson to pay the balance, until he forwarded the draft to the office of plaintiff at Seattle. Way was not present at the trial and it was not known to Ratchford or Anderson where he then was. At the close of the evidence counsel for the plaintiff offered to return to Way & Ratchford, or to pay to anyone whom the court thought entitled to it, the cash payment made to the plaintiff at the date of the purchase, but without interest. A tender of the money was not made.

Does the foregoing evidence establish a contract substantially as alleged in the answer? It may be conceded that Ramsland was not vested with authority to complete sales for the plaintiff. Nevertheless it cannot be controverted that by its acceptance of the cash payment made to Ramsland by Way & Ratchford in pursuance of the arrangement he made, its acquiescence in the possession and improvements of the lot by Way & Ratchford by consent of Ramsland, its demand for the payment of the deferred installments at their respective due dates, and its expressed election to "forfeit the contract" in December, 1910,

it purposely and with full understanding of its terms ratified the oral agreement entered into by Ramsland and became bound by it just as would a natural person have been bound had he made the agreement for himself under the same circumstances. Under its terms, Way & Ratchford were to receive a deed upon the discharge of the deferred payments. That it was the intention to have a formal contract executed in duplicate expressing the terms agreed upon, and perhaps others, is not of importance. If there were nothing else to consider, the conclusion would seem necessarily to follow that the terms of the contract as proved present such a material variance from that alleged, as [8] to amount to a failure of proof. But under the rule of law applicable, such is not the case. The variance is in the single particular as to when and how the balance of the purchase money was to be paid; otherwise the contract as alleged, and the terms of it, are clearly shown. The subject matter, the parties and the consideration were the same as alleged, and the obligation to make payment was the same. The plaintiff did not have title. It therefore could not, under the agreement as alleged or under that proved, have demanded performance by Way & Ratchford until it could tender a title. (Rev. Codes, sec. 6106.) In effect, the answer alleges the equities of defendants as they existed at the time the action was brought, instead of the specific terms of the contract. Though the evidence does not technically correspond to these allegations, it nevertheless supports them in their general scope and meaning. Therefore, the variance ought to have been disregarded as immaterial, within the rule declared by sections 6585 and 6586 of the Revised Codes, and the trial court ought to have awarded the defendants relief. It is apparent that the plaintiff was not misled to its prejudice in its defense to the counterclaim on the merits. Therefore, under the provisions cited *supra*, the trial judge should have treated the variance as immaterial and found according to the evidence, either after ordering the answer to be amended to correspond with the proof or without such an amendment. The divergence is one of detail rather than of

substance, and related merely to the mode of payment—a particular which was not of vital consequence. (*American etc. Loan Co. v. Great Northern Ry. Co.*, 48 Mont. 495, 138 Pac. 1102, and cases cited.) The conclusion of the trial court cannot be justified on the ground of variance.

The attempt by the plaintiff to declare a forfeiture was abortive. Conceding that it might have done so upon failure of Way & Ratchford on demand to pay the first deferred installment when it fell due, after extending to the firm indulgence until the last installment was due, it could not terminate the contract without tendering a conveyance or at least accompanying the demand for payment with an offer to convey. The obligation to convey was concurrent with the obligation to pay (Rev. Codes, sec. 4901), and the right to terminate the contract did not arise until plaintiff had acquired title and tendered or offered a conveyance. (*Boone v. Templeman*, 158 Cal. 290, 139 Am. St. Rep. 126, 110 Pac. 947; *Suburban Homes Co. v. North*, ante, p. 108, 145 Pac. 2; 39 Cyc. 1375.)

Nor can the action of the court be justified on the ground that Anderson was not shown to be the assignee of Way & Ratchford. Under the terms of the contract, Way & Ratchford were not vested with title, but a mere right to have title conveyed to the firm when plaintiff had acquired it. The right was the property of the firm. If the partnership was still in existence, Ratchford had the authority, as the general agent of the firm, subject, of course, to the provision of section 5483 of the Revised Codes, to make the assignment for the firm as he did. (Sec. 5482.) If the firm was in process of liquidation—and how this was does not appear—the assignment by Ratchford was valid, for ostensibly he was acting for the firm and had authority to dispose of its property. (Sec. 5502.) If he was not authorized to act as the liquidating partner, still Anderson paid him value for the right assigned, apparently relying upon the credit of the firm, and the consideration was devoted to its benefit. The assignment was for this reason valid. (Sec. 5501.)

The refusal by the plaintiff to accept Anderson's tender was [12] not because he did not tender cash, but because the contract had been forfeited. It was therefore sufficient at the time it was made. At the time the answer was filed, the draft was still in the hands of Mr. Sewall. Anderson, knowing nothing of the circumstances of its retention by Mr. Sewall, was justified in the belief that since he had sent it to Mr. Sewall to be used to pay the plaintiff, he being one of its officers, it was then in the possession of the plaintiff. Under the circumstances, the allegations in the answer that Anderson was willing that the plaintiff should retain the amount represented by the draft in payment of the balance due, coupled with the fact that the draft is now in the hands of the clerk, are equivalent to a tender of the amount due and a payment of it into court for plaintiff's benefit.

The order is affirmed.

Affirmed.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE SANNER, being disqualified, did not hear the argument and takes no part in the foregoing decision.

Rehearing denied May 7, 1915.

STATE EX REL. CARROLL, GUARDIAN, RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,654.)

(Submitted March 29, 1915. Decided April 13, 1915.)

[148 Pac. 312.]

Supervisory Control — District Judges — Disqualification — Imputed Bias and Prejudice — Statutes — Depriving Party of — Right — Abuse of Discretion — Guardian of Incompetent — "Party" — Continuance.

District Judges — Disqualification — Imputed Bias or Prejudice — Abridgment of Right.

1. The right conferred by subdivision 4 of section 6315, Revised Codes, as amended (Laws 1909, p. 161), upon parties to disqualify a

district judge for imputed bias or prejudice, cannot be abridged merely because it is subject to abuse.

Same—Right of Disqualification—"Party."

2. A guardian of the person and estate of an incompetent, is a "party," within the meaning of section 6315, Revised Codes, *supra*, to a proceeding to have such incompetent declared competent, and may therefore exercise the right to disqualify the district judge by filing the affidavit provided for therein.

[As to construction of word "party" in statute disqualifying judge related to party, see note in Ann. Cas. 1914C, 972.]

Same—Order Depriving Party of Right—Abuse of Discretion.

3. Section 6315, *supra*, provides that the affidavit necessary to bring about the disqualification of a district judge for imputed bias or prejudice must be filed at any time before the day fixed for the hearing, *etc.* The petition in a proceeding seeking the restoration of an incompetent to capacity was filed just before the closing hour of the business day; service upon the guardian of such person was made at 11 o'clock P. M. of the same day; the hearing was ordered set for the following day at 2 o'clock P. M. *Held*, that by the course pursued the court deprived the guardian of the right of disqualification conferred by section 6315, and order fixing day of hearing annulled as an abuse of discretion.

Same—Continuance—Filing of Affidavit—When too Late.

4. A continuance in the circumstances recited in paragraph 3, *supra*, would have been fatal to relator, under *State ex rel. Jacobs v. District Court*, 48 Mont. 410.

Original application for writ of supervisory control to annul an order of the District Court of Lewis and Clark County, and J. M. Clements, a judge thereof, setting a cause for hearing. Order annulled as an abuse of discretion.

Messrs. Galen & Mettler and *Mr. Ed. Phelan*, for Relator; *Mr. Frank W. Mettler* argued the cause orally.

Mr. Wellington D. Rankin, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The admitted facts in this proceeding are: On March 24, 1915, there was, and for approximately two years had been, pending in department No. 2 of the district court of Lewis and Clark county, Hon. J. Miller Smith, judge presiding, the guardianship of the person and estate of Mary Murphy, incompetent. On that day, at 4:50 P. M., and in that proceeding, Anna E. Nett filed her affidavit to disqualify Judge Smith from further

action save to transfer the proceeding to department No. 1, Hon. J. M. Clements, Judge, which was immediately done. Thereupon Mrs. Nett filed her petition praying that Mrs. Murphy be declared competent to manage her own business and affairs, and Judge Clements made an order setting said petition for hearing before himself on the following day, at 2 o'clock P. M., directing that a copy of the petition and order "be served upon those entitled to notice by law at sometime prior to March 25, 1915." Service was had upon the guardian, Joseph J. Carroll, at 11 o'clock P. M. of March 24, 1915, after he had retired for the night; but on the next day, before 2 o'clock P. M., he filed an affidavit of disqualification against Judge Clements, which the judge has ignored and intends to ignore. We are asked to annul the order referred to, as an abuse of discretion by Judge Clements, the specific contention being that the guardian was thereby deprived of his right of disqualification.

That a right may be conferred by statute; that when so conferred, it is entitled to judicial recognition; that such recognition cannot be withheld nor the right abridged because it is subject to abuse; and that subdivision 4 of section 6315, Revised Codes, as amended, is such a statute and confers such a right, are propositions too well settled for discussion. (*State ex rel. Working et al. v. District Court*, 50 Mont. 435, 147 Pac. 614; *State ex rel. First Trust & Sav. Bank v. District Court*, 50 Mont. 259, 146 Pac. 539; *Washoe Copper Co. v. Hickey*, 46 Mont. 363, 128 Pac. 584; *State ex rel. Carleton v. District Court*, 33 Mont. 138, 8 Ann. Cas. 752, 82 Pac. 789.) The questions, then, are whether under the circumstances such right was conferred upon the guardian, and whether the effect of the order was to take it from him.

It is urged by the respondents that, as the statute by its terms restricts the right of disqualification to parties, the guardian [2] cannot possess it, because he is not a party to the proceeding; and this suggests the inquiry how the matter comes to be before Judge Clements. The petition to this court recites, and the answer thereto admits, that before filing her petition for

the restoration of Mary Murphy to competency, Mrs. Nett presented her affidavit to disqualify Judge Smith in the guardianship proceeding—notwithstanding she was not a party to that proceeding nor, so far as appears, the agent of one. The record also indicates that the petition for restoration was filed in the guardianship proceeding, and, of course, if it was properly so filed and Judge Smith never really lost jurisdiction in that proceeding, the restoration matter is not before Judge Clements at all. The theory of respondents, however, and the one we are inclined to adopt, is that the petition for restoration initiated a separate and distinct proceeding. Anyhow, the guardian has an interest. Whether we view the proceeding for restoration as independent of the guardianship or within it, the guardian is a party—in the latter case manifestly so; in the former by express provision of law. (Rev. Codes, sec. 7767.)

But it is said that unless the affidavit is filed before the day fixed for the hearing, the right to disqualify is lost, and, as that [3] is the situation here, the guardian has no ground of complaint. The premises must be granted; but the conclusion would be of more value to the respondents if the subject of our review were the failure of Judge Clements to notice the affidavit of disqualification filed on the day of the hearing. As applied to the real question before us, the argument amounts to no more than a practical admission of the guardian's contention. The petition for restoration was presented within ten minutes of the closing of the business day of March 24, and the time for the hearing was fixed for the following day. Assuming that this was within the power of the court, the order reciting that it was made "upon good cause shown"—though no such cause actually appears—service could still have been directed to be made forthwith, to the end that whatever steps it might be necessary for the guardian to take before the day fixed for the hearing, could be taken or at least attempted. Instead of this, service was directed to be made "at some time prior to the 25th day of March, 1915"; it was so made, to-wit, one hour before—at a time when the guardian had retired and most people are in bed

—and the guardian's loss of his right to disqualify was the result. In the exercise of any authority to shorten or fix the time for a hearing, the situation of all parties must be considered, and we cannot concede that it lies within the sound discretion of any court to so act as to necessarily deprive any litigant of a substantial right. We are not obliged to conclude, as the guardian contends, that such was the intention; it is sufficient that a course was pursued from which no deviation can be suggested if such had been the purpose.

It is argued that the guardian is in no position to challenge [4] the order complained of, because he did not appear before the court below and ask a continuance, if that were necessary to his cause. This also might be tenable under some circumstances; but to save the particular right here involved, such a course would not only have been useless but fatal. (*State ex rel. Jacobs v. District Court*, 48 Mont. 410, 138 Pac. 1091.)

In our opinion, the order fixing the day of the hearing of the petition to restore Mary Murphy was, under the circumstances, an abuse of discretion by the judge who made it, and it is therefore annulled.

Order annulled.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

STATE EX REL. CARROLL, GUARDIAN, RELATOR, v. DISTRICT
COURT ET AL., RESPONDENTS.

(No. 3,555.)

(Submitted March 29, 1915. Decided April 13, 1915.)

[148 Pac. 314.]

*Supervisory Control — Disqualification of District Judges — De-
privation of Right — Abuse of Discretion.*

1. A proceeding looking to the removal of a guardian of the person and estate of an incompetent was transferred from one depart-

ment to another of a district court, ten minutes before the closing hour of the business day; the judge of the latter department on the next day made an order setting the hearing for 3 o'clock P. M. of the same day, service being made upon the guardian at 10:30 o'clock A. M. *Held*, under *State ex rel. Carroll v. District Court*, ante, p. 506, that the order setting the hearing for the hour at which it was fixed was an abuse of discretion, and therefore void.

Original application for writ of supervisory control to review an order of the District Court of Lewis and Clark County, and J. M. Clements, a judge thereof, setting the day of hearing of a cause. Order annulled.

Messrs. Galen & Mettler and Mr. Ed. Phelan, for Relator.

Mr. Wellington D. Rankin, for Respondents.

MR. JUSTICE SANNER delivered the opinion of the court.

On March 3, 1915, a petition by Anna E. Nett was filed in department No. 2 of the district court of Lewis and Clark county, Hon. J. Miller Smith, judge presiding, praying for the removal of Joseph J. Carroll as guardian of the person and estate of Mary Murphy, incompetent. Thereafter, and at 4:50 P. M. on March 24, she presented to Judge Smith an affidavit imputing bias and prejudice to him in the matter of said guardianship, whereupon the same was transferred to department No. 1, Hon. J. M. Clements, Judge. On March 25 Judge Clements made an order setting the hearing of the petition to remove the guardian for the same day at 3 o'clock P. M., directing notice of such hearing to be served before noon, and service was made upon the guardian at 10:30 o'clock in the morning. Thereafter, and before 3 o'clock P. M. of that day, the guardian filed his affidavit seeking to disqualify Judge Clements, but this the judge has ignored and intends to ignore. This court is asked, under its supervisory power, to annul the order referred to as an abuse of discretion by Judge Clements, the specific contention being that the guardian was thereby deprived of his right of disqualification. Under the authority of *State ex rel. Carroll v. District*

Court, ante, p. 506, 147 Pac. 312, the order complained of is annulled.

Order annulled.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

AVERILL MACHINERY CO., APPELLANT, v. BAIN,
RESPONDENT.

(No. 3,495.)

(Submitted March 30, 1915. Decided April 15, 1915.)

[148 Pac. 334.]

Collateral Security — Definition — Pledge — Complaint — Insufficiency.

"Collateral Security"—Definition.

1. "Collateral security" means a pledge of personal property assigned or transferred and delivered by a debtor to a creditor as security for the payment of a debt or the fulfillment of an obligation.

[As to definition and nature of pledges, see notes in 49 Am. Dec. 730; 32 Am. St. Rep. 711. As to distinction between pledge and chattel mortgage, see note in Ann. Cas. 1912B, 962. As to distinction between pledge and sale, see note in Ann. Cas. 1915A, 1082. As to rights and remedies of parties to collateral security, see notes in 79 Am. Dec. 499; 32 Am. St. Rep. 711. As to care and diligence required of pledgee, see notes in 34 Am. Dec. 451; 83 Am. St. Rep. 792.]

Same—Pledge—Rights of Parties.

2. The legal title to property pledged remains in the pledgor; the lien the pledgee has upon it depends for its validity upon his possession; and when the principal debt is paid, the pledge is discharged and the pledgor is entitled to a return of the property pledged.

Same—Writings to be Construed Together.

3. An order for the payment of money and acceptance thereof executed contemporaneously and relating to the same transaction must be construed together.

Same—Complaint—Insufficiency.

4. Where, in an action to enforce payment of collateral security, the complaint did not allege that at the time it was brought the whole or some part of the pledgor's indebtedness remained unpaid, it did not state a cause of action.

Same—Indebtedness—Insufficient Allegation.

5. An allegation that pledgor was indebted to the pledgee in the month of June, 1910, was insufficient to disclose an indebtedness in November of the year following, when the action was commenced.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

ACTION by the A. H. Averill Machinery Company against J. P. Bain. Judgment for defendant, and plaintiff appeals from it and an order denying a new trial. Affirmed.

Mr. Wm. M. Blackford, for Appellant, submitted a brief and argued the cause orally.

Messrs. Belden & De Kalb, for Respondent, submitted a brief; *Mr. O. W. Belden* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The complaint in this action alleges that on June 21, 1910, one Ira Miller, being then indebted to the plaintiff, executed and delivered to it the following order in writing:

"June 21st, 1910. No. 0909. \$400.00

"To J. P. Bain, Knerville, Mont.

"Please pay to the order of The A. H. Averill Machinery Co. (a corporation), of Portland, Oregon, Four Hundred no-100 Dollars, and charge the same to my account for plowing done. This order is given The A. H. Averill Machinery Co. as collateral security to notes held by it, the net amount, if collected, to be credited on said notes; otherwise this order to be returned to drawer.

IRA MILLER."

And that plaintiff thereupon presented the order to defendant Bain, who indorsed it in writing as follows:

"I hereby accept this order, payable Nov. the 1st, 1910, at First State Bank, Stanford, Mont. And I agree to pay interest at the rate of ten per cent per annum after maturity, if not then paid.

J. P. BAIN."

It is then alleged that the defendant has not paid the sum of \$400 or any part thereof, and a prayer for judgment follows.

The defendant prevailed in the lower court, and plaintiff has appealed from the judgment and from an order denying its motion for a new trial. At the opening of plaintiff's case, the defendant objected to the introduction of any evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action. The objection was overruled, but if it should have been sustained, it is unnecessary to consider what other errors were committed upon the trial. If the complaint does not state a cause of action, it would not sustain any judgment which plaintiff might secure.

The complaint discloses upon its face that the order was not delivered by Miller, or accepted by plaintiff, with the intention that the general title to it should pass. It was only intended as collateral security to Miller's indebtedness, and so recites.

When used in connection with the term "security," the word "collateral" has no technical, legal significance distinct from its common, well-understood meaning. (*Seanor v. McLaughlin*, [1] 165 Pa. St. 150, 32 L. R. A. 467, 30 Atl. 717.) "The term 'collateral security' or 'collateral' means a pledge of incorporeal property assigned or transferred and delivered by a debtor or some one for him to a creditor as security for the payment of a debt or the fulfillment of an obligation. It stands by the side of the principal obligation as an additional means to secure the payment of the debt or fulfillment of the obligation." (Jones on Collateral Securities, 3d ed., sec. 1; *Moffatt v. Corning*, 14 Colo. 104, 24 Pac. 7; *Colebrooke on Collateral Securities*, 2d ed., sec. 2; *International Trust Co. v. Union Cattle Co.*, 3 Wyo. 803, 19 L. R. A. 640, 31 Pac. 408; 2 Words & Phrases, 1252.) The term refers to personal property exclusively and in common parlance to choses in action. (31 Cyc. 786.) The transaction by which collateral security is delivered by the debtor and accepted by the creditor constitutes a pledge. (Secs. 5774, 5775, Rev. Codes; Jones on Collateral Securities, [2] sec. 1.) The legal title to property pledged remains in the pledgor. (*Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 327.) The pledgee has a special property interest in the thing pledged;

that is, he has a lien upon it which depends for its validity upon possession. (*Rairden v. Hedrick*, 46 Mont. 510, 129 Pac. 498.) When the principal debt is paid, the pledge is discharged (31 Cyc. 851), and the pledgor is entitled to a return of the pledge. (*Seanor v. McLaughlin*, above.)

These elementary rules of law suffice to illustrate the relationship of the parties to this action. Since it was not the intention of Miller or plaintiff that the absolute title to the Bain order should pass, it could not have been the intention of Bain, in accepting the order, to bind himself unconditionally to pay the amount to plaintiff; and plaintiff could not have understood [3] that such unqualified liability existed. The order and acceptance, executed contemporaneously and relating to the same transaction, are to be construed together. (*Lyon v. Dailey Copper Min. & S. Co.*, 46 Mont. 108, 126 Pac. 931.) In order to [4] state a cause of action upon a contract, the plaintiff must disclose the existence of a valid agreement, a right in himself, and a breach by the defendant. Without the existence of the principal debt, plaintiff could not enforce payment of the collateral security; and in failing to allege that the whole or some part of Miller's indebtedness remained unpaid at the time this action was commenced, plaintiff failed to state facts sufficient to disclose any right to enforce collection of the Bain order, which was given merely as further security for the payment of such indebtedness. (16 Ency. Pl. & Pr. 638.) The allegation [5] that Miller was indebted to plaintiff in June, 1910, is not sufficient to disclose an indebtedness in November, 1911, when this action was commenced. The complaint fails to put the defendant in the wrong. It does not state a cause of action, and the judgment and order are therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

NELSON, APPELLANT, v. NORTHERN PACIFIC RY. CO.
ET AL., RESPONDENTS.

(No. 3,492.)

(Submitted March 30, 1915. Decided April 17, 1915.)

[148 Pac. 338.]

Personal Injuries—Master and Servant—Railroads—Federal Liability Act—Warning Signals—Excessive Speed—Contributory Negligence—Admissions.

Personal Injuries—Negligence—Proximate Cause—Pleading and Proof.

1. In a personal injury action by an employee against his employer, whether based upon a breach of duty expressly enjoined by statute or upon a violation by the latter of his common-law duty, the plaintiff must allege facts and circumstances disclosing a breach of duty, and establish by his evidence that such breach was the proximate cause of his injury.

[As to proximate and remote causes of injury from negligence, see notes in 50 Am. Rep. 569; 36 Am. St. Rep. 807.]

Same—Railroads—Arrival of Trains—Posting Notice—Statutory Requirements.

2. *Quære*: Was Chapter 105, Laws of 1909, page 145, requiring railway companies to post notices at stations along its line of the arrival of passenger trains, enacted for the protection of employees as well as for the convenience of the public, and may a violation of such Act be alleged as negligence in an action for personal injuries by a railway employee, brought under the Federal Employers' Liability Act (Chap. 149, 35 Stat. 64)?

[As to duty of railroad companies to keep their stations safe for passengers and others, see note in 29 Am. St. Rep. 55.]

Same—Railroads—Warning Signals—Duty of Employer.

3. Employees of railway companies come within the protection of the rule that signals must be given of the approach of trains to warn persons on the track or in dangerous proximity thereto. Failure to observe the precaution when ordinary prudence and diligence require it is evidence of negligence. Where the statute enjoins the duty to warn, failure to obey its mandate is negligence *per se*.

Same—Railroads—Warning Signals—Extent of Duty.

4. While in the open country and at a distance from public crossings, where the view is unobstructed, and the train is on time, the duty to give precautionary signals may be relaxed or entirely dispensed with, even though a section crew is known to be ahead on the track—the members thereof being presumed to guard themselves against danger—warning of the approach of the train must be given, where the view is obstructed and the train is not running on schedule time.

Same—Proximate Cause—Evidence—Insufficiency.

5. Alleged negligence on the part of defendant company's locomotive engineer in failing to give warning of the approach of his train, held not to have been a proximate cause of plaintiff's injury, the evidence disclosing that the latter observed the approach of the train in ample time to get out of danger's way.

Same—Railroads—Excessive Speed of Train—Negligence.

6. The movement of a passenger train at a higher rate of speed than that allowed by the schedule is not negligence *per se*; hence where a section foreman alleged excessive speed as an element of negligence resulting in the collision in which he was injured, and testified that the train was running at a speed of from fifty to sixty miles an hour, but omitted to show that the engineer did not use every facility at his command to check the speed upon observing plaintiff, or that because of the speed maintained he could not have avoided the collision, he failed to make out a *prima facie* case of negligence in this respect and was properly nonsuited.

[As to violation of statute or ordinance limiting speed of train, see note in Ann. Cas. 1912D, 1107.]

Same—Employer's Liability—Federal Act—Contributory Negligence.

7. In an action for personal injuries brought under the Federal Employers' Liability Act, a plea of contributory negligence is not available in any case, except to diminish the amount of damages, and may not be interposed for any purpose in cases in which the violation of a statute enacted for the safety of employees has contributed to the injury.

[As to what is "accident arising out of and in course of employment" within Employers' Liability Act, see note in Ann. Cas. 1914D, 1284.]

Same—Contributory Negligence—Plea not Admission of Negligence.

8. A plea of contributory negligence, when coupled with a denial, involves merely a hypothetical admission for the purpose of the plea, and does not relieve the plaintiff of the burden of proving negligence on the part of the defendant in some one or more of the particulars alleged in the complaint.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

ACTION by Lars M. Nelson against the Northern Pacific Railway Company and J. T. Sheedy. From a judgment of nonsuit, and from an order denying him a new trial, plaintiff appeals. **Affirmed.**

Mr. E. A. Carleton, for Appellant, submitted a brief and argued the cause orally.

In the following cases it was expressly held that railroad employees are entitled to the same protection as persons who are not such employees in crossing railroad tracks within the city limits in the performance of their duties, under a city ordinance which required that the bell on the engine be rung continuously while the train was within the city limits: *Illinois Cent. Ry. Co. v. Gilbert*, 157 Ill. 354, 41 N. E. 724; *Gulf etc. Ry. Co. v. Calvert*,

11 Tex. Civ. App. 297, 32 S. W. 246; *Houston etc. Ry. Co. v. Burnett*, 49 Tex. Civ. App. 244, 108 S. W. 404; *Louisville etc. Ry. Co. v. Schroader* (Ky. App.), 113 S. W. 874; *Illinois etc. Ry. Co. v. McIntosh*, 118 Ky. 145, 80 S. W. 496, 81 S. W. 270; *International etc. Ry. Co. v. Tisdale*, 39 Tex. Civ. App. 372, 87 S. W. 1063; *Indiana etc. Ry. Co. v. Otstot*, 113 Ill. App. 37, affirmed in 212 Ill. 429, 72 N. E. 387. Plaintiff had the right, under the authorities, to rely on the company's performance of its statutory duty to bulletin the train and to comply with the law. (*Schultz v. Chicago & N. W. Ry. Co.*, 44 Wis. 638; *Cleveland etc. Ry. Co. v. Powers*, 173 Ind. 105, 88 N. E. 1073, 89 N. E. 485; *Pittsburgh etc. Ry. Co. v. Rogers*, 45 Ind. App. 230, 87 N. E. 28.) A violation of statutes or ordinances relating to the movement and running of trains is not a risk assumed by a railroad employee, but, on the contrary, the railway company owes to its employees the duty to obey the law. (*Pittsburgh etc. Ry. Co. v. Moore*, 152 Ind. 345, 44 L. R. A. 638, 53 N. E. 290.)

In the absence of any law, statute or city ordinance regarding the ringing of the bell or sounding the whistle, it is incumbent upon the railway company to make and enforce all reasonable rules and regulations to guard against accidents at railway crossings and at all dangerous places. (*Dick v. Indianapolis etc. Ry. Co.*, 38 Ohio St. 389; *McKenna v. Missouri Pacific Ry. Co.*, 54 Mo. App. 161.)

As to fencing statutes: Employees are entitled to the benefit of them the same as anybody else. (*Quackenbush v. Wisconsin etc. Ry. Co.*, 62 Wis. 411, 22 N. W. 519.) The rule in New York state is the same. There the court of appeals holds that the duty to fence is one which exists as to all the world, and that where a brakeman is injured by the collision of his train with an animal which has come upon the track through a defective fence, the company is liable for the damages. (*Donnegan v. Erhardt*, 119 N. Y. 468, 7 L. R. A. 527, 23 N. E. 1051; *Mendizabal v. New York etc. Ry. Co.*, 89 App. Div. 386, 85 N. Y. Supp. 896; *Atchison etc. Ry. Co. v. Reesman*, 60 Fed. 370, 23

L. R. A. 768, 9 C. C. A. 20; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228, 28 L. Ed. 410, 4 Sup. Ct. Rep. 369; *Chicago etc. Ry. Co. v. Wise*, 206 Ill. 453, 69 N. E. 500; *Fleming v. St. Paul etc. Ry. Co.*, 27 Minn. 111, 6 N. W. 448; *Louisville etc. Ry. Co. v. Bodine*, 109 Ky. 509, 56 L. R. A. 506, 59 S. W. 740; *Camp v. Chicago, Great Western Ry. Co.*, 124 Iowa, 238, 99 N. W. 735; *Hoffard v. Illinois Cent. R. Co.*, 138 Iowa, 543, 16 L. R. A. (n. s.) 797, 110 N. W. 446; *Chicago etc. Ry. Co. v. Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768.)

Appellant insists that this record discloses that the defendants have admitted and confessed that they were negligent. This being true, the action of the court in sustaining the motion for a nonsuit was error. (*Birsch v. Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940; *Nelson v. City of Kalispell*, 47 Mont. 416, 132 Pac. 1133.)

Under the facts of this case, the alleged release was void. (See *Boutten v. Wellington & P. Ry. Co.*, 128 N. C. 337, 38 S. E. 920, 13 Am. Neg. Rep. 513; *Dorsett v. Clement-Ross Mfg. Co.*, 131 N. C. 254, 42 S. E. 612, 13 Am. Neg. Rep. 514; *Clayton v. Consolidated Traction Co.*, 204 Pa. 536, 54 Atl. 332; *Houston etc. Ry. Co. v. Milam* (Tex. Civ. App.), 58 S. W. 735; *Great Northern Ry. Co. v. Kasischke*, 104 Fed. 440, 43 C. C. A. 626; *Davis v. Diamond Carriage etc. Co.*, 146 Cal. 59, 79 Pac. 596; *Colorado City v. Liafe*, 28 Colo. 468, 65 Pac. 630; *Burik v. Dundee Woolen Co.*, 66 N. J. L. 420, 49 Atl. 442; *Lusted v. Chicago etc. Ry. Co.*, 71 Wis. 391, 36 N. W. 857.) *O'Donnell v. Clinton*, 145 Mass. 461, 14 N. E. 747, is the case of a release being avoided for fraud where the plaintiff was an illiterate man. (*Missouri Pac. Ry. Co. v. Goodholm*, 61 Kan. 758, 60 Pac. 1066; *O'Brien v. Chicago etc. Ry. Co.*, 89 Iowa, 644, 57 N. W. 425; 6 Thompson on Negligence, sec. 7376; 5 Labatt's Master & Servant, 2d ed., p. 6021.) Whether or not there was any ratification is a question for the jury. (*Missouri etc. Ry. Co. v. Brantley*, 26 Tex. Civ. App. 11, 62 S. W. 94; 24 Cyc. 1066, and note 72; *Abrahams v. Los Angeles Traction Co.*, 124 Cal. 411, 57 Pac. 216; *Gibson v. Western N. Y. etc. R. R.*, 164 Pa.

142, 44 Am. St. Rep. 586, 30 Atl. 308; *Michalsky v. Centennial Brewing Co.*, 48 Mont. 1, 134 Pac. 307.) That the plaintiff did not pay back or tender the \$300 paid in the settlement is no defense. Under the authorities, the jury would be instructed to deduct that sum from any verdict they should find the plaintiff was entitled to recover. (*Merrill v. Pike*, 94 Minn. 186, 102 N. W. 393; *Bjorklund v. Seattle Electric Co.*, 35 Wash. 439, 1 Ann. Cas. 443, 77 Pac. 727, 17 Am. Neg. Rep. 139; *Rockwell v. Capital Traction Co.*, 25 App. Cas. (D. C.) 98, 4 Ann. Cas. 648.) See, also, *Michalsky v. Centennial Brewing Co.*, 48 Mont. 1, 134 Pac. 307, which disposes of many questions raised on this appeal and canvassed in this brief.

Messrs. Gunn, Rasch & Hall, for Respondents, submitted a brief; *Mr. Carl Rasch* argued the cause orally.

The case made here is this: The plaintiff was fully aware of the approach of the train when it was yet nearly a half mile away, and the hand-car could have been removed with entire safety to plaintiff and his men if Mike Leopardi had not fallen down and the men at the east end of the car had done as well as the men at the west end. That they did not succeed was not due to any act or omission of the defendants, and neither the failure, if there was such failure, to blow the whistle, nor ring the bell, nor the speed of the train, nor the omission to report the train late at Garrison, if the statute requiring such reports to be made is applicable at all to a case of this kind, had anything to do with the accident, and the plaintiff's injuries were not proximately caused by any or either of them. (*Texas etc. Ry. Co. v. Eason*, 92 Fed. 553, 34 C. C. A. 530; *Pope v. Wabash R. Co.*, 242 Mo. 232, 146 S. W. 790; *McManamee v. Missouri Pac. Ry. Co.*, 135 Mo. 440, 37 S. W. 119; *Rutherford v. Iowa Central Ry. Co.*, 142 Iowa, 744, 121 N. W. 703; *Central of Georgia Ry. Co. v. McKey*, 13 Ga. App. 477, 79 S. E. 378.)

That statutory requirements such as make it the duty of railway companies in this state to report trains running behind schedule time are not applicable to employees is well settled.

Thus the statutory duty of keeping a flagman at street crossings does not apply to employee. (*Kansas City etc. Ry. Co. v. Kirksey*, 60 Fed. 999, 9 C. C. A. 321; *Rohback v. Pacific R. R.*, 43 Mo. 187); nor speed ordinances (*Louisville etc. Ry. Co. v. Hairston*, 122 Ga. 372, 50 S. E. 120; *Louisville etc. Ry. Co. v. Holland*, 164 Ala. 73, 137 Am. St. Rep. 25, 51 South. 365; *Birmingham Ry. etc. Co. v. Mosely*, 164 Ala. 111, 51 South. 424; *Wright v. Southern Ry. Co.*, 80 Fed. 260); nor statutory warning signals (*Norfolk etc. R. Co. v. Gesswine*, 144 Fed. 56, 75 C. C. A. 214; *Rogers v. Cincinnati etc. R. Co.*, 136 Fed. 573, 69 C. C. A. 321; *Lepard v. Michigan Central Ry. Co.*, 166 Mich. 373, 130 N. W. 668; *Hitz v. St. Louis etc. Ry. Co.*, 152 Mo. App. 687, 133 S. W. 397; *O'Brien v. Erie R. Co.*, 210 N. Y. 96, 103 N. E. 895); nor the duty imposed by statute to fence the right of way (*Carper v. Norfolk etc. Ry. Co.*, 78 Fed. 94, 35 L. R. A. 135, 23 C. C. A. 669; *Newson v. Norfolk etc. R. Co.*, 81 Fed. 133).

The defendants did not by their pleadings admit negligence. (See *Kansas City etc. Ry. Co. v. Crocker*, 95 Ala. 412, 11 South. 262; *McDonald v. Montgomery etc. Ry. Co.*, 110 Ala. 161, 20 South. 317; *Louisville etc. Ry. Co. v. Pearce*, 142 Ala. 680, 39 South. 72.) We do not dispute the correctness of the proposition that the plea of contributory negligence on the part of plaintiff, when standing alone, is one in the nature of confession and avoidance, and assumes and presupposes negligence on the part of the defendant. But, when pleaded in conjunction with a general denial, there is not an admission of negligence on the part of defendants. (See, also, *Jackson v. Natchez etc. R. Co.*, 114 La. 981, 108 Am. St. Rep. 366, 70 L. R. A. 294, 38 South. 701; *Clemens v. St. Louis etc. R. Co.*, 35 Okl. 667, 131 Pac. 169; *Leavenworth Light & H. Co. v. Waller*, 65 Kan. 514, 70 Pac. 365; 5 Ency. Pl. & Pr. 12, "Under Code"; 29 Cyc. 582.)

Plaintiff assumed the risk. (*Sullivan v. Fitchburg R. Co.*, 161 Mass. 125, 36 N. E. 751; *Jolly v. Detroit etc. R. Co.*, 93 Mich. 370, 53 N. W. 526; *Texas & P. Ry. Co. v. Myers* (Tex. Civ.), 125 S. W. 49; *Molt v. Northern Pac. Ry. Co.*, 44 Mont. 471, 120 Pac.

809; 2 Bailey on Personal Injuries, par. 356.) The action is based upon the Federal Employers' Liability Act, which has superseded state legislation. (*Melzner v. Northern Pac. Ry. Co.*, 46 Mont. 277, 127 Pac. 1002.) By the provisions of section 4 of that Act, the defense of assumption of risk is left unimpaired and the same as at the common law, except in cases, "where the violation of such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." (*Mondou v. New York etc. R. Co.*, 223 U. S. 1, 38 L. R. A. (n. s.) 44, 56 L. Ed. 327, 32 Sup. Ct. Rep. 169; *Neil v. Idaho etc. R. Co.*, 22 Idaho, 74, 125 Pac. 331.)

The settlement between plaintiff and defendant company was a complete discharge of any claim or demand which the plaintiff had, and this is true, even though there was a failure to perform a promise for light employment, if that was one of the terms of the settlement. (34 Cyc. 1054, 1077.) The failure to perform the promise to give light employment was a breach of the alleged settlement agreement, and the plaintiff's remedy is on the contract. (*Johnson v. Charleston etc. Ry. Co.*, 58 S. C. 488, 36 S. E. 851; *Hobbs v. Brush Electric Light Co.*, 75 Mich. 550, 42 N. W. 965; *Pioneer Tel. & Tel. Co. v. Grider*, 34 Okl. 206, 124 Pac. 949.) In any event, a contract of settlement having been made, but only partially performed, no action for injuries could be maintained without a rescission of the contract and a return of the consideration which had been received. (Sec. 5065, Rev. Codes; *Cotter v. Butte etc. Smelting Co.*, 31 Mont. 129, 77 Pac. 509; *McNinch v. Northwest Thresher Co.*, 23 Okl. 386, 138 Am. St. Rep. 803, 100 Pac. 524; *Babcock v. Farwell*, 245 Ill. 14, 137 Am. St. Rep. 284, 19 Ann. Cas. 74, 91 N. E. 683; *Memphis St. R. Co. v. Giardino*, 116 Tenn. 368, 8 Ann. Cas. 176, 92 S. W. 855; *Louisville etc. Ry. Co. v. McElroy*, 100 Ky. 153, 37 S. W. 844; *Modern Woodmen v. Vincent*, 40 Ind. App. 711, 14 Ann. Cas. 89, 80 N. E. 427, 82 N. E. 475; *Hinchman v. Matheson Motor Car Co.*, 151 Mich. 214, 115 N. W. 48; *Whitwell v. City of Aurora*, 139 Mo. App. 597, 123 S. W. 1045;

Ambellan v. Barcalo Mfg. Co., 118 App. Div. 547, 102 N. Y. Supp. 993; *Mahr v. Union Pac. R. Co.*, 170 Fed. 699, 96 C. C. A. 19.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The injuries for which recovery is sought in this action were sustained by the plaintiff during the course of his employment by the defendant railway company as section foreman. The action was brought under the Federal Employers' Liability Act, approved April 22, 1908 (Chap. 149, 35 Stat. 64; U. S. Comp. Stats. (Supp. 1911), p. 1322, Fed. Stats. Ann. (Supp. 1909), p. 584), as amended by the Act approved April 5, 1910 (Chap. 143, 36 Stat. 291, U. S. Comp. Stats. (Supp. 1911), p. 1325, 1 Fed. Stats. Ann. (Supp. 1912), p. 335). It is alleged in the complaint that the defendant railway company, hereafter referred to as the company, was the owner and was engaged in the operation of a line of railway as a common carrier in interstate commerce, and that at the time of his injuries plaintiff was in its employ in that business. The evidence discloses these facts:

Plaintiff came to this country from Norway in 1906. He is not well enough acquainted with the English language to read and write it. He was in the employ of the company as a section-hand, from May of that year until July, 1908. He again entered the company's service as section foreman in November, 1910, and continued therein until June 8, 1911, when he was injured. He had become thoroughly familiar with his duties. There was under his charge a crew of seven men. The work allotted to him and his crew was to keep in order a section of the line of the company's railway, extending about five miles west of Garrison, in Powell county, a regular stopping station for all trains. The railway has a double track from this station to Missoula. The headquarters of plaintiff and his crew were at Garrison. A passenger train designated as No. 41 was due to leave Garrison for the west, according to the regular schedule,

at 6:50 o'clock in the morning of June 8. At 6:55 o'clock, before taking out his crew, the plaintiff went to the station to get his mail and ascertain the movement of trains, particularly of train No. 41, the leaving time of which he knew. On this morning it was behind schedule time, but that fact was not noted on the bulletin-board kept at the station. If the train was on time, plaintiff with his crew followed it from the station, the work for the day beginning at 7 o'clock; otherwise it was necessary to keep a lookout for it to avoid being run down by it. He could observe the movement of the train because it was visible from his house as it approached and left the station. He supposed that the train had left the station, though it does not appear that he made any effort to ascertain whether this was so, other than to consult the board. He left the station with his crew at 7 o'clock, riding on a hand-car. He made three stops as he proceeded, one for the purpose of inspecting a bridge, and the others to listen for the coming of a train. These stops were necessary because the car made some noise and plaintiff was keeping a careful lookout for trains. Each of them consumed some minutes. After passing mile-post 54 a stop was made to listen, but no train being within hearing, plaintiff proceeded, all the members of the crew "pumping" the car, four of them facing to the west and four to the east. There are three curves in the line of track between mile-posts 52 and 55, the last known as the "Big Bend," a sharp curve about a third of a mile in length and ending near the beginning of the mile between posts 54 and 55. After the last stop the car had been kept going at a speed of about five miles an hour; for a distance of half a mile to a point midway between posts 54 and 55. At this point the attention of plaintiff was called by one of the crew to the approach of belated train 41. Looking back ten seconds later he saw the smoke of the engine and a second later the train itself approaching at a speed estimated by him to be from 50 to 60 miles an hour. When he saw the smoke, the train was about one-fourth of a mile away. Effort was at once made to stop the car, and it was stopped within a short

distance the length of which plaintiff could not state further than to say within three rail-lengths, or ninety-nine feet. Two of the men left the car when the approach of the train was first noticed; two others sought places of safety as soon as the car came to a stop. The plaintiff, assisted by the three who remained, attempted to remove the car to the other track. He and one of the men, Leopardi, took hold of the west end, the other two at the east end. As they were lifting the car, Leopardi fell, thus hindering the removal of it to the other track. The plaintiff again observed the train when it was a distance of from 200 to 300 feet away. He "felt that the way the train was going, there was time enough for the men to lift the car off the track in between the two tracks." Plaintiff and Leopardi succeeded in getting their end off the track and beyond striking distance of the train. The men at the other end did not succeed in moving it beyond striking distance, with the result that the train in passing struck one corner of it and by the impact hurled it against plaintiff, breaking both his arms and otherwise injuring him. Leopardi was killed. Plaintiff expressed the opinion that the car could have been gotten safely off the track, and out of the line of danger, if the men at the other end had been active. He said: "If the men behind had done as well as we men in front we could have got the car cleared from the track." The car with the tools upon it was 600 or 700 pounds in weight. The plaintiff did not hear a whistle or bell at any time, though his hearing was good. Where he was, the whistle could be heard about a mile. Questioned as to why he did not leave the car and go into a place of safety, he stated: "A. In charge, as section foreman, I was responsible for hand-car and for the rest of the company's property that I was carrying. That is the first thing, and the last thing was 41 was behind,—passenger train was behind and if I had skiddooed and left the hand-car on the track, 41 would have run into it and might be ditched with it. Might have ditched 41 with the hand-car, do you know. Q. Yes; anything else? A. And 41

was loaded with good many people; there might be some injuries and killing."

It is alleged that the defendants were guilty of negligence in three particulars: (1) In the failure of defendant Sheedy, the engineer in charge, to ring the bell or sound the whistle to notify the plaintiff of the approach of the train so that he could get out of its way; (2) in running the train at a dangerous rate of speed, when, by the exercise of ordinary prudence, defendants should have known that plaintiff would be at or near the place where he was injured, in the discharge of his duties as section foreman; and (3) in the failure of the company to have its employees at Garrison post notice upon the bulletin-board that train 41 was late.

The answer, besides denying the negligence charged, alleges these affirmative defenses: That the plaintiff's injuries were caused by his own negligence; that he was guilty of contributory negligence; that he assumed the risk, and that, subsequent to his injuries, he had released and acquitted the company of liability in consideration of its payment to him of \$300. The replication assails the validity of the release on the ground of fraud and deceit. At the close of plaintiff's evidence the court granted a nonsuit on the ground, among others, that the complaint does not allege, and the evidence fails to disclose, culpable negligence on the part of defendants, and directed judgment accordingly. The plaintiff has appealed from the judgment and an order denying his motion for a new trial.

It is the rule, recognized by the courts everywhere that, in order for plaintiff to recover for personal injuries suffered by reason of a breach of duty owed to him by defendant, it is [1] indispensably necessary that he allege facts and circumstances disclosing such breach of duty, and also establish by his evidence that it was the proximate cause of his injury. (*Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243; *Bracey v. Northwestern Imp. Co.*, 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706; 4 Labatt on Master & Servant, sec. 1570.) The rule applies as well to those breaches of

duty expressly enjoined by statute upon employers for the protection of their employees in the operation of railways and the prosecution of other hazardous pursuits, as to violations of those obligations which, in the absence of statutory provisions, the employer is under to his employees. (*Monson v. La France C. Co., supra.*)

At the hearing in this court, counsel for plaintiff stated that [2] he would not rely upon the charge that the company was guilty of negligence in failing to have notice posted on the bulletin-board at Garrison that train No. 41 was behind schedule time, for the reason that, though the statute requiring the hour of the arrival of passenger trains to be posted at all stations along the lines of railways in this state (Laws 1909, Chap. 105, p. 145), was enacted for the protection of railway employees as well as for the convenience of the public, it has no application to cases arising under the federal statute. We are thus relieved of the necessity of determining the question whether the statute was intended as a protective provision, and whether, if so, a violation of it may be alleged as negligence under the federal statute. Neither is it necessary, as we view the case, to analyze the complaint and determine the contention of counsel for the defendants that its allegations are not sufficient, from any point of view, to support a judgment. The vital question in the case is whether the evidence furnishes a basis for the inference that plaintiff's injuries were proximately caused by the failure of the engineer to ring the bell or sound the whistle as he entered upon the Big Bend curve, or by the high rate of speed at which he was running the train.

The purpose to be served by warning signals is to give notice [3] of the approach of trains so that persons on the track or in dangerous proximity thereto may protect themselves from danger. A failure to observe the precaution when ordinary prudence and diligence require it, even in the absence of a statutory injunction, is evidence of negligence; when there is such an injunction, the mere failure to obey it is negligence *per se*. (*Hunter v. Montana Cent. Ry. Co.*, 22 Mont. 525, 57 Pac. 140.)

Employees come within the protection of the rule; otherwise, by entering into the employment of a railway company an employee wholly releases it from the duty it owes to every member of the public whose business or pleasure may bring him in dangerous proximity to the line of railway. It may not apply so strictly in favor of employees as other persons, because in the performance of their duties they must be in the company's yards or on or near the track in other places, and for this reason must exercise care and diligence for their own safety, commensurate with the circumstances, to the end that the movement of trains may not be obstructed. Nevertheless, the measure of duty which the company owes to them must be determined by the circumstances as they exist in each particular case.

[4] (*Neary v. Northern Pac. Ry. Co.*, 37 Mont. 461, 19 L. R. A. (n. s.) 446, 97 Pac. 944.) Ordinarily, in the open country and at a distance from public crossings where the track is straight and the view unobstructed, and the train is on time, the duty of maintaining a lookout and of giving precautionary signals may be relaxed or entirely dispensed with, even when the engineer in charge of the train knows, or is presumed to know, that a section crew is ahead on the track. He may presume that the members of the crew will maintain a lookout and guard against danger to themselves and also to the property of the company in their charge, as well as the passengers being carried upon the train. When, however, the surroundings are such that the view is obstructed and the approach of a train cannot be readily observed and the train is not running on schedule time—which was the situation in this case—it would seem that the dictates of ordinary prudence would require some warning of its approach to be given. It is not necessary to consider here, however, the extent to which the rule applies generally or the character of particular cases to which it applies.

The only evidence in the record as to the failure of the defendant Sheedy to give warning of the approach of his train is [5] the statement by the plaintiff that his hearing was good, that he was on the lookout for a train, that at that place the

whistle could be heard a mile, and that he did not hear any signal. This statement may be of doubtful evidentiary value in view of the fact that the hand-car was in motion and made some noise, because it is questionable that the plaintiff was so situated that he would have heard it had a signal been given. (1 Wigmore on Evidence, sec. 664.) Yet, accepting it as sufficient to show that none was in fact given, the failure to give it was clearly not the cause of the collision. The plaintiff saw the train when it was at such a distance that he had ample time to get out of its way. That this is true is demonstrated by the fact that four members of the crew did get to places of safety,—two of them after the car was brought to a stop. That plaintiff thought so is further demonstrated by the fact that after the train had approached to within a distance of from 200 to 300 feet, he was of the opinion that, considering the rate at which it was approaching, there was yet ample time to get the car off the track also. That he was mistaken in this and was injured in an abortive attempt to save the car as well as to prevent injury to the train and its passengers, does not show, or tend to show, that the injury was caused by the failure of the engineer to give a warning signal. Having himself observed the danger in ample time to save himself, he cannot maintain the claim that negligence, which did not in any way contribute to it, was the cause of his injury. The delinquency of the engineer, though negligence, was a condition and not an effective cause.

That the engineer was moving his train at a high rate of [6] speed, possibly in excess of the schedule rate, was not *per se* negligence. It is a matter of common knowledge that when a train is late, the schedule rate is not adhered to. (*Hoskins v. Northern Pac. Ry. Co.*, 39 Mont. 394, 102 Pac. 988.) In attempting to save his car, prevent injury to it and a possible derailment of the train, the plaintiff was within the scope of his employment. (*Hollenback v. Stone & Webster Eng. Corp.*, 46 Mont. 559, 129 Pac. 1058.) It was his duty to make every effort compatible with his own personal safety to rescue his car

from destruction or injury, and also to protect the train with those in charge of it and the passengers thereon from the danger incident to a collision. (*Hollenback v. Stone & Webster Eng. Corp.*, *supra*.) He was not under any legal obligation to do this; but by his effort to do it he did not, as a matter of law, incur the imputation of negligence. (*Da Rin v. Casualty Co. of America*, 41 Mont. 175, 137 Am. St. Rep. 709, 27 L. R. A. (n. s.) 1164, 108 Pac. 649; *Bracey v. Northwestern Imp. Co.*, 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706.) When the attempt is to rescue a person, it is necessary to a recovery by the rescuer for injury suffered by him, to show precedent negligence toward the person in peril or toward himself after the attempt has begun. When this appears, it is a question for the jury whether the attempt was made under such circumstances as to constitute rashness in the judgment of prudent persons. In such case a person must act promptly, if at all, because a moment's delay will be fatal. There is no time for deliberation. The law has such a high regard for human life, that it will indulge the presumption that one who has risked his life for the safety of another, was prompted by dictates of humanity rather than by a rash disregard of his own safety. (*Bracey v. Northwestern Imp. Co.*, *supra*.) The same rule applies, though perhaps with less indulgence, to a case in which an employee attempts to save the property of his employer. As we have seen, the high rate of speed did not in itself constitute negligence. There is neither allegation nor proof that the engineer observed the effort of the plaintiff and his companions to remove the car. If it be said that the law would, under the circumstances, presume that he observed the situation and, in the exercise of reasonable care, should have checked the speed of the train and brought it to a stop if necessary, there is no word of proof that he failed to use every facility at his command for this purpose, or that, because of the high rate of speed at which he was going, he could not have avoided the collision. Therefore, there is no proof of negligence upon which a recovery may be predicated. So far as the record discloses, the sole cause of the injury was the ac-

cident which befell Leopardi, causing delay in the effort to remove the car, and the lack of effective activity or haste by the two members of the crew at the east end of it by reason of which a corner of it was left in striking distance of the engine. Upon the case as made by the evidence, the plaintiff cannot recover and the court properly directed a nonsuit.

Counsel makes the contention seriously that a plea of contributory negligence is an admission of the negligence alleged in the complaint, and that, since, under the federal statute, contributory negligence is not a bar to the action, the nonsuit was improperly granted. Under section 3 of the Act, a plea of contributory negligence is not available in any case, except to diminish the amount of damages, and may not be interposed for any purpose in cases in which the violation of a statute enacted for the safety of employees has contributed to the injury. (*Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. Rep. 635.) But the statute does not in anywise affect the office of the plea when it is available, except as expressly indicated. In the case of *Day v. Kelly*, 50 Mont. 306, [8] 146 Pac. 930, the same contention was made as counsel makes here. The office and effect of such a plea was examined in the light of the decisions on the subject, and it was determined that the plea, when coupled with a denial, involves merely a hypothetical admission, and does not in any measure relieve the plaintiff of the burden of proving negligence on the part of the defendant in some one or more of the particulars alleged in the complaint. The contention, therefore, cannot be sustained.

Counsel has assigned error upon several rulings of the court in excluding evidence. We do not think that plaintiff was prejudiced by any of them. Such items as were even remotely competent and material were subsequently admitted without question. The others were properly excluded as immaterial.

In view of our conclusion on the other features of the case, it is not necessary to consider whether the evidence touching the execution of the release upon which defendants rely was

sufficient to show that the company's claim agent practiced fraud or deceit upon the plaintiff.

The judgment and order are affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

LYON, APPELLANT, v. CHICAGO, MILWAUKEE & ST. P.
RY. CO. ET AL., RESPONDENTS.

(No. 3,509.)

(Submitted March 30, 1915. Decided April 20, 1915.)

[148 Pac. 386.]

Waters and Watercourses—Flooding Lands—Negligence—Burden of Proof—Evidence—Res Ipsa Loquitur—Inapplicability of Doctrine.

Negligence—Burden of Proof.

1. An inference of negligence may not be drawn from the bare occurrence of an injury in any case; hence the contention, in an action against a railway company for damages incident to the giving way of an embankment alleged to have been negligently constructed, that the mere washing away of the embankment made out a *prima facie* case of negligence against defendant, and that the burden then shifted to it, was without merit.

[As to accident as evidence of negligence, see note in 20 Am. St. Rep. 490; 30 Am. St. Rep. 736; 6 Am. St. Rep. 792.]

Same—Evidence—Res Ipsa Loquitur—Inapplicability of Doctrine.

2. The rule "*res ipsa loquitur*" goes no further than to make out a *prima facie* case; it has the force and effect of a disputable presumption and cannot exist where facts are known and where from the evidence different inferences may be drawn as to the producing cause of the injury.

Same.

3. Where plaintiff had produced evidence sufficient to make out a *prima facie* case of the negligence alleged in her complaint, she could not in addition invoke the doctrine of *res ipsa loquitur*, since such a course would have permitted the jury to give double weight to the evidence, to the facts as shown, and to the inference or presumption deduced by the law from the existence of those facts.

[As to rule of *res ipsa loquitur* as relieving plaintiff of burden of showing negligence, see note in Ann. Cas. 1914D, 908.]

Appeal from District Court, Granite County; Geo. B. Winston, Judge.

ACTION by Ella F. Lyon against the Chicago, Milwaukee & St. Paul Railway Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Messrs. Walsh, Nolan & Scallon and *Mr. D. M. Durfee*, for Appellant, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

Appellant contends that by defendants' removing some of the natural ground which served as a bank and leaving the portion which they did to serve as an embankment, and this portion going out, a case was presented to which the doctrine of *res ipsa loquitur* applied. (*Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 157, 86 Pac. 29; *Dempster v. Oregon Short Line Ry. Co.*, 37 Mont. 335, 96 Pac. 717.) The presumption of negligence arose which made out a *prima facie* case for appellant, and the burden was cast upon the respondents to overcome this presumption by evidence showing that they exercised ordinary care. This doctrine has been generally applied in the case of the breaking of dams and ditches. 3 Farnham on Watercourses, section 875, declares that the giving way of a dam will raise a presumption that it was not maintained as it should have been, and place the burden of showing care upon its owner, citing the case of *Whiteside v. Collier*, 100 Ill. App. 611. (See, also, *City Water Co. v. City of Fergus Falls*, 113 Minn. 33, Ann. Cas. 1912A, 108, 32 L. R. A. (n. s.) 59, 128 N. W. 817; *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838; *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 52 L. R. A. 922, 59 N. E. 925; *Dalton v. Selah Water Users' Assn.*, 67 Wash. 589, 122 Pac. 4.)

Mr. Geo. W. Korte, of the bar of Seattle, Washington, and *Mr. Wingfield L. Brown*, for Respondents, submitted a brief; *Mr. Korte* argued the cause orally.

The making of a *prima facie* case, by presumption or otherwise, does not change the burden of proof. The object of coun-

sel's contention by his objection to instruction 14 is to avail himself of the rule of *res ipsa loquitur*, that when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the defendant being negligent, negligence will be presumed. Counsel's insistence is untenable for three reasons: (a) The doctrine of *res ipsa loquitur* has no application where all the facts and circumstances appear in evidence. Its sole office is in aid of a *prima facie* case before defendant is put to proof. (See *Beeman v. Puget Sound Traction etc. Co.*, 79 Wash. 137, 39 Pac. 1087; *Spaulding v. Chicago & N. W. Ry. Co.*, 33 Wis. 582; *State v. Hodge*, 50 N. H. 510; *Gibson v. International Trust Co.*, 177 Mass. 100, 52 L. R. A. 928, 58 N. E. 278; *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870; *Menominee River Sash & Door Co. v. Milwaukee etc. Ry. Co.*, 91 Wis. 447, 65 N. W. 176.) Presumptions in themselves are not evidence. (Hammon on Presumptions, etc., 47; *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70; *McGinnis v. Kempsey*, 27 Mich. 363; *Lisbon v. Lyman*, 49 N. H. 553; *Woodward v. Chicago etc. R. Co.*, 145 Fed. 577, 75 C. C. A. 591; *Dowell v. Guthrie*, 99 Mo. 653, 17 Am. St. Rep. 598, 12 S. W. 900; *Stearns v. Ontario Spinning Co.*, 184 Pa. 519, 63 Am. St. Rep. 807, 39 L. R. A. 842, 39 Atl. 292; *Central of Georgia Ry. Co. v. Wazelbaum*, 111 Ga. 812, 35 S. E. 645.)

(b) It cannot be applied to the particular facts in this case. (Elliott on Railroads, 2d ed., sec. 1644, pp. 576, 577; *Huff v. Austin*, 41 Ohio St. 386, 15 Am. St. Rep. 613, 21 N. E. 864; *Benedick v. Potts*, 88 Md. 52, 41 L. R. A. 478, 40 Atl. 1067; *Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838.)

There is another and decisive reason why the rule of *res ipsa loquitur* cannot be revoked by plaintiff. The cases all hold, including our own court, that if the evidence shows other causes, for which the defendant is not responsible, might have produced the injury, the reason for the rule fails, because under those conditions the defendant has as much right to invoke the rule as the plaintiff. (See *Shaw v. New Year Gold Mines Co.*, 31

Mont. 138, 77 Pac. 515; *McGowan v. Nelson*, 36 Mont. 67, 92 Pac. 40; *Andree v. Anaconda Copper Min. Co.*, 47 Mont. 554, 133 Pac. 1090; *Monson v. La France Copper Co.*, 39 Mont. 50, 133 Am. St. Rep. 549, 101 Pac. 243; *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275; *Lewinn v. Murphy*, 63 Wash. 356, Ann. Cas. 1912D, 433, 115 Pac. 740; *Strehlau v. John Schroeder Lumber Co.*, 142 Wis. 215, 125 N. W. 429.) The two dam cases, relied upon by counsel for reversal, condemn the application of the rule of *res ipsa loquitur* whenever other causes appear which might have caused the damage.

(c) If applicable, the rule does not change the burden of proof, but that burden remains always upon the plaintiff at every stage of the trial. The supreme court of California, in a number of cases, has directly ruled in negligence cases against the specific objection which counsel has made to the instruction under discussion. Our own court has approved of the California decisions in a line of cases analogous and direct in principal, but never has had occasion to apply it in a negligence case. (*Scott v. Wood*, 81 Cal. 398, 22 Pac. 871; *Valente v. Sierra Ry. Co.*, 151 Cal. 534, 91 Pac. 481.) In *Sewell v. Detroit United Ry.*, 158 Mich. 407, 123 N. W. 2, the supreme court of Michigan cites with approval the case of *Scott v. Wood*, *supra*, as does also the supreme court of Ohio in *Klunk v. Hocking Valley Ry. Co.*, 74 Ohio St. 125, 77 N. E. 752. (See, also, *Lincoln Traction Co. v. Webb*, 73 Neb. 136, 119 Am. St. Rep. 879, 102 N. W. 258; *Rapp v. Sarpy County*, 71 Neb. 382, 98 N. W. 1042, 102 N. W. 242; *Dowell v. Guthrie*, 99 Mo. 653, 17 Am. St. Rep. 598, 12 S. W. 900; *Kay v. Metropolitan St. Ry. Co.*, 163 N. Y. 447, 57 N. E. 751; *Powers v. Russell*, 13 Pick. (Mass.) 69; *Sweeney v. Erving*, 228 U. S. 233, 57 L. Ed. 815, 33 Sup. Ct. Rep. 416.) We can find no case as well in point as the one just cited. The instruction requested by the plaintiff is, in terms, the objections made by the plaintiff at bar to the instruction in question. The instruction given by the court is identical with the one attacked. (See, also, *Western Transportation Co. v. Downer*, 11 Wall.

(U. S.) 129, 20 L. Ed. 160; *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 52 L. R. A. 922, 59 N. E. 925; *Holbrook v. Utica etc. Ry.*, 12 N. Y. 236, 64 Am. Dec. 502.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This cause was before this court on a former appeal (*Lyon v. Chicago, M. & St. P. Ry. Co.*, 45 Mont. 33, 121 Pac. 886.) Upon the second trial the defendants prevailed and plaintiff has appealed from the adverse judgment. A somewhat extended statement precedes our former opinion, and only such facts will be restated as are necessary to illustrate the single question now presented. The line of the railway company's road through Hellgate canyon was constructed along the river. At a particular bend in the river near Drummond, earth, rock and gravel were taken from the right of way for making grades and fills, with the result that a barrow-pit, deeper than the river channel, was excavated, leaving a portion of the natural surface of the earth between the pit and the river for an embankment or berm. In June, 1908, this embankment or berm was washed away. Large quantities of debris were carried upon plaintiff's land, and the river itself cut a new channel through her property, causing the damage for which redress was sought in this action. The defendants were charged with negligence in excavating the barrow-pit to a point so near the river that the embankment remaining was insufficient in thickness and strength to retain the waters of the river within its natural channel, and because of this negligence the embankment gave way, with the resulting injury to plaintiff's property. The defendants denied any negligence on their part and pleaded that the embankment was destroyed by an unprecedented flood or an act of God, and that the debris was carried to and upon plaintiff's land by the waters of the river flowing through a slough and certain ditches which plaintiff maintained as a part of her irrigating system. Upon the trial the court submitted instruction No. 14, to which plaintiff objected upon the ground that "under the facts in this

[1] case, the going out of the berm or embankment made out a *prima facie* case of negligence against the defendants, and the burden was upon them to show that they exercised ordinary care and prudence in leaving the embankment as they did." The same objection was made to instruction No. 15, but is not applicable at all, and that instruction is dismissed from further consideration. The objection to instruction 14 raises the only question which appellant has presented for determination.

If, by the objection made, counsel meant to urge that the burden of proof shifted to defendants, they were in error. Upon the issue of defendants' negligence plaintiff had the affirmative, and every rule of law and logic imposes upon her the burden of proving that negligence as alleged, by a preponderance of the evidence. (Rev. Codes, sec. 7972; *Kipp v. Silverman*, 25 Mont. 296, 64 Pac. 884; *Gallick v. Bordeaux*, 31 Mont. 328, 78 Pac. 583; *Woods v. Latta*, 35 Mont. 9, 88 Pac. 402.) There is not any instance where from the bare fact that an injury occurs an inference of negligence can be drawn. (*Benedick v. Potts*, 88 Md. 52, 41 L. R. A. 478, 40 Atl. 1067.) We assume, however, that counsel meant no more than that the embankment gave way under such circumstances as pointed clearly to defendants' negligence as the cause, and called for them to go forward with the proof in explanation of their connection with it.

The rule *res ipsa loquitur* invoked by appellant, when properly applied, operates to make out a *prima facie* case, but goes [2] no further. (*Hardesty v. Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29; 8 Thompson's Com. on the Law of Negligence, sec. 3635; 1 Elliott on Evidence, sec. 91.) It has the force and effect of a disputable presumption of law and supplies the place of proof necessarily wanting. (*Spaulding v. Chicago & N. W. Ry. Co.*, 33 Wis. 582; *Beeman v. Puget Sound Traction etc. Co.*, 79 Wash. 137, 139 Pac. 1087.) The maxim applies in negligence cases upon the theory that the plaintiff is not in a position to show the particular circumstances which caused the offending instrumentality to operate to his injury, but that the defendant,

having its exclusive management and control, and being thus more favorably situated, possesses the knowledge of the cause of the accident, and should, therefore, be required to produce the evidence in explanation. (*Lynch v. Ninemire Packing Co.*, 63 Wash. 423, 115 Pac. 838; *City Water Power Co. v. City of Fergus Falls*, 113 Minn. 33, Ann. Cas. 1912A, 108, 32 L. R. A. (n. s.) 59, 128 N. W. 817; *Griffen v. Manice*, 166 N. Y. 188, 82 Am. St. Rep. 630, 52 L. R. A. 922, 59 N. E. 925.) The rule does not apply, however, in any case where from the evidence different inferences may be drawn as to the producing cause of the injury (*McGowan v. Nelson*, 36 Mont. 67, 92 Pac. 40; *Andree v. Anaconda Copper Min. Co.*, 47 Mont. 554, 133 Pac. 1090); and since its effect is that of a presumption only, it cannot exist in the presence of the known facts. (*Gibson v. International Trust Co.*, 177 Mass. 100, 52 L. R. A. 928, 58 N. E. 278; *Bell [3] v. Town of Clarion*, 113 Iowa, 126, 84 N. W. 962.) If the plaintiff is in position to allege the specific negligent acts which caused the injury and can produce evidence in support of the charge sufficient to make out a *prima facie* case, the doctrine *res ipsa loquitur* cannot be invoked, for to apply it under such circumstances would permit the jury to give double weight to the evidence: first to the facts themselves, and also to the inference or presumption which the law deduces from the existence of those facts, or some of them. (1 Elliott on Evidence, sec. 92.)

Upon the trial plaintiff sought to prove in her case in chief the specific acts of negligence charged in her complaint, and that such negligence was the proximate cause of the injury to her property. The evidence thus produced, if believed by the jury, amply sustained her pleading and made out a *prima facie* case. This was the view of the trial court also. The bill of exceptions epitomizes the proof and recites that "the evidence introduced in behalf of the plaintiff tended to show that the defendants were guilty of negligence, in connection with leaving the berm as it was left, and the testimony introduced in behalf of the defendants tended to show that the defendants were not guilty of negligence in that connection; the testimony of the

defendants tending to show that the damage to plaintiff's premises was caused by the waters of the Bergman slough overflowing her premises; the testimony of the plaintiff tending to show that the waters of the Bergman slough in no manner tended to cause the damage."

Having established a *prima facie* case by evidence of the facts constituting the negligence which caused her damage, plaintiff could not invoke the rule *res ipsa loquitur*. The cause was properly submitted to the jury upon the evidence, not upon presumptions. Instruction 14 is not open to the objection interposed.

The judgment is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

SMITH ET AL., RESPONDENTS, v. NORTHERN PACIFIC RY.
CO., APPELLANT.

(No. 3,497.)

(Submitted March 30, 1915. Decided April 21, 1915.)

[148 Pac. 393.]

*Northern Pacific Land Grant—Right of Way—Scope of Grant—
Rights of Subsequent Grantees—Damages to Property.*

Railroads—Grant of Right of Way—Extent of Grant.

1. The grant of land to the Northern Pacific Railroad company for right of way purposes took effect at the time the Act was approved; the title conveyed by it dates from that time; the rights conferred upon the company, its successors and assigns, are subject to no conditions save those expressed or necessarily implied; it was founded on valuable considerations and should receive a more liberal construction, in favor of the purposes for which it was made, than a mere private grant.

Same.

2. The grant above mentioned carried with it, among other things, not only the exclusive possession of the lands described for the construction of a railroad, but also the right to erect thereon all structures necessary and essential to its operation.

[As to right of railroad company to permit use of right of way or station grounds by private individual, see note in Ann. Cas. 1912A, 180.]

Same.

3. When a grant of a right of way is made to a railroad without restrictions, it contemplates not merely the railroad as established in the first instance, but the railroad with all its necessary appurtenances as it may from time to time come necessarily to be.

Same—Rights of Subsequent Grantees—Injury to Property.

4. *Held*, that since the grant of land to the Northern Pacific Railroad Company for right of way purposes contemplated at the outset the erection and maintenance of such structures, equipment and machinery necessary for the operation of the railroad as it might be established in the first instance and come thereafter to be, and since coal-docks in its railroad yards near a city are necessary appliances, plaintiffs, as subsequent grantees of land adjacent to defendant company's right of way taking title from the United States, the common grantor, hold subject to the rights vested in the company by the prior grant, and are therefore not entitled to recover damages for injury to their property caused by coal-dust, soot, smoke, noises, etc., occasioned by the operation of such coal-docks.

Appeal from District Court, Missoula County; R. Lee McCulloch, Judge.

ACTION by James E. and Julia Smith against the Northern Pacific Railway Company. Judgment for plaintiffs and defendant appeals. Reversed.

Messrs. Gunn & Rasch and *Mr. Wm. F. Wayne*, for Appellant, submitted a brief; *Mr. Carl Rasch* argued the cause orally.

The grant was one *in praesenti*, and took effect at, and the title thereby conveyed relates back to, the time of its approval, and the rights which it conferred upon the grantee, its successors and assigns, are subject to no conditions except those expressed in the grant. (*Wilkinson v. Northern Pac. R. Co.*, 5 Mont. 538, 6 Pac. 349; *Bybee v. Oregon etc. R. Co.*, 139 U. S. 663, 35 L. Ed. 305, 11 Sup. Ct. Rep. 641; *Doran v. Central Pac. Ry. Co.*, 24 Cal. 245; *Northern Pac. Ry. Co. v. Wadekamper*, 70 Wash. 392, 126 Pac. 909.) The grant was not a mere gift (*Moon v. Salt Lake County*, 27 Utah, 435, 76 Pac. 222), nor a mere bounty (*United States v. Denver etc. Ry. Co.*, 150 U. S. 1, 37 L. Ed. 975, 14 Sup. Ct. Rep. 11), but it was a contract "founded on a mutual consideration" (*Northern Pac. R. Co. v. Carland*, 5 Mont. 146, 3 Pac. 134), and "such legislation stands upon a somewhat different footing from merely a private grant,

and should receive at the hands of the courts a more liberal construction in favor of the purposes for which it was enacted." (*Moon v. Salt Lake County, supra.*) By the terms of the grant, the railroad company was not only given the right and authority, but it was made its duty, to construct, maintain and operate a railroad "with the appurtenances," in order to carry into effect the purposes of the Act. This included all the means, appliances and instrumentalities requisite for the proper operation of the road, and these would have been included in the grant of the right of way made, as it was, for railroad purposes, even if the term "appurtenances" had not been used. (*Mattice v. Chicago etc. Ry. Co.*, 130 Iowa, 749, 107 N. W. 949.) As was said in *United States Trust Co. v. Atlantic etc. Ry. Co.*, 8 N. M. 673, 47 Pac. 725: "In its ordinary acceptation, and large sense, the term 'railroad' fairly includes all structures which are necessary and essential to its operation." (*United States v. Denver etc. Ry. Co.*, 150 U. S. 1, 37 L. Ed. 975, 14 Sup. Ct. Rep. 11; *Atchison etc. Ry. Co. v. Kansas etc. Ry. Co.*, 67 Kan. 569, 70 Pac. 939, 73 Pac. 899; *Northern Pac. R. Co. v. Carland*, 5 Mont. 146, 3 Pac. 134.)

The defendant is the successor of the Northern Pacific Railroad Company, and became vested with all the rights which accrued to its predecessor in interest under the grant. It has long since been settled law that the rights of persons, acquiring title to the public lands subsequent to the making of a grant for railroad right of way purposes, are "inferior to the right of way to the company, and must yield to the superior legal title." (*Wilkinson v. Northern Pac. R. Co.*, 5 Mont. 538, 6 Pac. 349; *Bybee v. Oregon etc. R. Co.*, 139 U. S. 663, 35 L. Ed. 305, 11 Sup. Ct. Rep. 641; *Doran v. Central Pac. Ry. Co.*, 24 Cal. 245; *Northern Pac. Ry. Co. v. Wadekamper*, 70 Wash. 392, 126 Pac. 909; *Cassidy v. Old Colony R. R.*, 141 Mass. 174, 5 N. E. 142; *Kipp v. Davis-Daly Copper Co.*, 41 Mont. 509, 21 Ann. Cas. 1372, 36 L. R. A. (n. s.) 666, 110 Pac. 237; *Western Union Tel. Co. v. Polhemus*, 178 Fed. 904, 29 L. R. A. (n. s.) 465, 102 C. C. A. 105; *Brainard v. Clapp*, 64 Mass. 6, 57 Am. Dec. 74.)

The plaintiffs base the claim of their asserted right to recover in this case upon section 14 of Article III of the Constitution, which provides that "private property shall not be taken or damaged for public use without just compensation having been first made or paid into court for the owner," and in support of it, cited in the court below, among others, the Tennessee case of *Louisville etc. Terminal Co. v. Lellyett*, 114 Tenn. 368, 1 L. R. A. (n. s.) 49, 85 S. W. 881, and the New York case of *Cogswell v. New York etc. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537. For the purpose of the argument we shall concede here, as we conceded in the court below, that the authorities are hopelessly divided upon the question whether statutory authority alone to commit an act which injuriously affects the property of others may be urged as a defense to an action for damages where the person whose property is injured has neither consented to nor acquiesced in the doing of that which causes the injury. The facts of this case do not require a determination here of that question. In this case, the right of way was acquired from the common grantor and predecessor of both parties, plaintiffs and defendant, in whom the title to plaintiffs' land was still vested at the time the grant was made, and in whom it continued to be vested for a long time afterward. The grant of the right of way was a conveyance made by the United States for the purpose of constructing and operating a railroad "with the appurtenances," not only in its public and governmental capacity, but also in its proprietary capacity as owner, and it included the right to make use of the lands granted for all purposes "necessary and suitable * * * in constructing or operating" the railroad. (*Hord v. Holston River R. Co.*, 122 Tenn. 399, 135 Am. St. Rep. 878, 19 Ann. Cas. 331, 123 S. W. 637; *Chicago-Rock Island etc. Ry. Co. v. Smith*, 111 Ill. 363; *Bennett v. Long Island R. Co.*, 181 N. Y. 431, 74 N. E. 418; *Louisville & N. R. Co. v. Scomp*, 124 Ky. 330, 98 S. W. 1024; 1 Elliott on Railroads, par. 418; *Kotz v. Illinois Central R. Co.*, 188 Ill. 578, 59 N. E. 240; *Illinois Central R. Co. v. Anderson*, 73 Ill. App. 621; *Irwin v. Yazoo & M. V. R. Co.*, 99 Miss. 394,

55 South. 49; *Gillespie v. Buffalo R. & P. Co.*, 226 Pa. 31, 74 Atl. 738; *Hileman v. Chicago G. W. Ry. Co.*, 113 Iowa, 591, 85 N. W. 800; *Chicago M. & St. P. Ry. Co. v. Rehnke*, 113 Minn. 390, 129 N. W. 771; *White v. Chicago etc. R. Co.*, 122 Ind. 317, 7 L. R. A. 257, 23 N. E. 782; *Nunnamaker v. Columbia Water Power Co.*, 47 S. C. 485, 58 Am. St. Rep. 905, 34 L. R. A. 222, 25 S. E. 751; *Watts v. Norfolk & W. R. Co.*, 39 W. Va. 196, 45 Am. St. Rep. 894, 23 L. R. A. 674, 19 S. E. 521.) The rule announced in the foregoing cases and authorities is determinative of this case in defendant's favor.

Messrs. Hall & Whitlock, for Respondents, submitted a brief.

We believe the weight of authority is to the effect that if certain acts are sufficient to constitute a private nuisance, authorization of them by the legislature or by Congress does not in any way change their character or constitute a defense. We are free to admit at the outset that it would not be possible for every person living near a railroad track to recover damages for injuries to his property caused by passing trains or the ordinary operation of trains upon the railroad, and the reason for this is not that the railroad company has a charter authorizing it to operate, but that as members of the community individuals must put up with a certain amount of annoyance in consideration of the public good, and where the damage suffered comes within that fringe of damage which must be borne by all, the injury constitutes a so-called *damnum absque injuria*, but when the damage suffered or the burden imposed is greater than that imposed upon the public generally, and does not fall within the class just mentioned, the same constitutes a nuisance, and the old maxim, "*Sic utere tuo ut alienum non laedas*," applies.

The cases upon the effect of legislative authorization in matters of this kind are collected in a long note in 1 L. R. A. (n. s.) 1-137. The leading case upon the subject is the case of *Baltimore etc. R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 27 L. Ed. 739, 2 Sup. Ct. Rep. 719. The grant in that case

was as broad as in our case, and the permission was granted by Act of Congress. The action was brought for damage caused by the erection and maintenance of an engine-house and machine-shop on a parcel of land immediately adjoining plaintiff's church, which tended to disturb the congregation and to destroy the value of the building as a place of public worship. Judgment was rendered for the plaintiff below and affirmed by the supreme court of the United States. A case very similar to the case at bar, which was decided in favor of our contention, is *Spring v. Delaware etc. R. R. Co.*, 88 Hun, 385, 34 N. Y. Supp. 810, referred to in 1 L. R. A. (n. s.) 75, note, affirmed in 157 N. Y. 692, 51 N. E. 1094, and in that case the defendant was held liable notwithstanding the fact it was authorized by the legislature to operate its railroad. The leading New York case is *Cogswell v. New York etc. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537, which together with its following in the state of New York hold in accordance with our contention. To the same effect are *Wylie v. Elwood*, 134 Ill. 281, 23 Am. St. Rep. 673, 9 L. R. A. 726, 25 N. E. 570; *Sullivan v. Royer*, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655; *Adams v. Chicago etc. Ry. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644, 1 L. R. A. 493, 39 N. W. 629; *Anderson v. Chicago etc. Ry. Co.*, 85 Minn. 337, 88 N. W. 1001; *Rainey v. Red River etc. R. Co.*, 99 Tex. 276, 122 Am. St. Rep. 622, 13 Ann. Cas. 580, 3 L. R. A. (n. s.) 590, 89 S. W. 768, 90 S. W. 1096; *King v. Vicksburg etc. Light Co.*, 88 Miss. 456, 117 Am. St. Rep. 749, 6 L. R. A. (n. s.) 1036, 42 South. 204; *Alabama etc. Ry. Co. v. King*, 93 Miss. 379, 22 L. R. A. (n. s.) 603, 47 South. 857; *Pickens v. Coal River Boom etc. Co.*, 66 W. Va. 10, 24 L. R. A. (n. s.) 354, 65 S. E. 865; *Choctaw etc. R. Co. v. Drew*, 37 Okl. 396, 44 L. R. A. (n. s.) 38, note, and cases cited, 130 Pac. 1149.

An examination of the cases opposing our contention will disclose that the decisions go off either on the ground that the acts shown constitute simply a *damnum absque injuria*, or that the distinction between public and private nuisance has not been observed.

We have no fault to find with the cases cited early in appellant's brief to the effect that the grant contained in the Act of 1864 dates from the time of the passage of the Act, nor do we find any language in the cases there cited, particularly the two Montana cases which in any way seems to indicate that in the opinion of our court immunity was granted from liability for private nuisance. No such question arose in those cases. The rule of construction of grants of this character is established by a long line of decisions of the supreme court of the United States, beginning with the case of *Dubuque etc. R. R. Co. v. Litchfield*, 23 How. (U. S.) 66, 16 L. Ed. 500, and followed by the following cases, and many others: *Rice v. Minnesota etc. R. R. Co.*, 1 Black. (U. S.) 358, 17 L. Ed. 147; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55, 11 Sup. Ct. Rep. 478; *Louisville etc. R. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. Ed. 849, 16 Sup. Ct. Rep. 714; *United States v. Oregon etc. R. R. Co.*, 164 U. S. 526, 539, 41 L. Ed. 541, 17 Sup. Ct. Rep. 165; *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 34, 50 L. Ed. 353, 26 Sup. Ct. Rep. 224.

The circumstances surrounding this case show that the use sought to be made of the premises granted to defendant railway company for right of way purposes was not within the contemplation of the parties at the time of the grant; hence the defendant should be held liable for the damage flowing from its acts. (*Missouri etc. Ry. Co. v. Mott*, 98 Tex. 91, 70 L. R. A. 579, 81 S. W. 285; *Mosier v. Oregon Nav. Co.*, 39 Or. 256, 87 Am. St. Rep. 652, 64 Pac. 453; *Missouri etc. Ry. Co. v. Anderson*, 36 Tex. Civ. App. 121, 81 S. W. 781; *Missouri etc. Ry. Co. v. Wetz*, 97 Tex. 581, 80 S. W. 988.)

MR. JUSTICE SANNER delivered the opinion of the court.

The plaintiffs are the owners of certain lots in block 95 of the Railroad Addition to the city of Missoula, upon which several dwelling-houses are situated, occupied by the plaintiffs and their tenants. In the fall of 1907 and the early part of 1908, the defendant, a railway corporation, erected a coal-dock upon

its right of way in its railroad yards at Missoula for the purpose of supplying its locomotive engines with coal. The dock is about eighty feet high, with a raised track on the north side from which coal is dumped into it, and by means of machinery and appliances power is provided for the operation of the dock in handling the coal. The complaint alleges that the dock contains, and always has contained, fine coal and coal-dust as a part of all the coal there used; that in and about the regular use and operation of said dock, fine coal, dust, soot and smoke are caused to be liberated and carried from said dock and from the locomotives and appliances left there to, upon and against the premises of the plaintiffs about 150 feet distant; that by reason of the use and operation of said dock, the bringing of cars and locomotives thereto, the unloading of cars and the loading of locomotives with coal, great and intolerable noises, sounds, dust, smoke, soot and dirt are and have been caused to emanate from said dock, machinery and instrumentalities, and great vibrations, shaking and jarring of the air, ground and buildings in the vicinity thereof have been occasioned; that the dock was constructed in a thickly populated residence district of Missoula, and since it has been in operation, and whenever it is used, coal, coal-dust, soot and smoke have been carried to and cast upon the premises and household goods of the plaintiffs, covering the same, and sifting through doors, windows, cracks and openings in plaintiffs' houses, has covered the furniture, household goods and personal effects of the plaintiffs and their tenants, damaging and deteriorating the same in value; that by reason of the sounds, noises, vibrations, shaking and jarring it is difficult to hear in or at plaintiffs' houses and premises, and plaintiffs and their tenants have been kept awake nights; that it is necessary to close the windows day and night, excluding fresh air; that the plastering has become cracked and said operations cause the premises to vibrate and to be greatly jarred and shaken; that the acts complained of constitute a private nuisance to the plaintiffs, rendering the occupancy of the premises uncom-

fortable and causing a great diminution in the value thereof, all to the plaintiffs' damage in the sum of \$3,000.

The answer admits that in the regular operation of the coal-dock some coal-dust and smoke are at times carried and blown from the dock to and upon plaintiffs' premises, and that such operation is accompanied by noises caused by the working of the machinery and appliances and the movement of engines and locomotives; but it is denied that the acts of the defendant in the operation and use of the dock constitute a private, or any, nuisance, and it is alleged that the dock has always been operated without the causing of any annoyance, damage or injury to plaintiffs, other than such as are incident to the ordinary operation of said dock.

By way of affirmative defense, the defendant alleges that it is a common carrier of persons and freight on and over its line of railroad extending from St. Paul, Minnesota, through Montana and thence westward to the Pacific coast; that it is the successor in interest to all property and property rights of the Northern Pacific Railroad Company, a railroad corporation created by the Act of Congress of July 2, 1864; that by said Act of Congress there was granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction and operation of said railroad, a right of way through the public lands of the United States, and at the time said grant was made, all the land upon which said railroad was afterward constructed, and is now being operated, and the lands now owned by plaintiffs, were, and for a long time thereafter continued to be, a part of the unappropriated public domain of the United States; that for the purpose of enabling the defendant to properly discharge the duties imposed upon it by said Act of Congress, and its duties as a common carrier, it is necessary to construct, erect, operate and use coal-docks upon its said right of way at railroad stations along the line of its railroad in order to provide and supply its engines and locomotives with coal for the operation of its trains; that the coal-dock in question was erected and is situated and operated upon the defendant company's own land

and premises, within its railroad yards at Missoula, Montana, and upon and within the granted right of way in order to enable it properly to operate its said railroad.

The plaintiffs, disdaining to reply, moved for judgment on the pleadings, which motion was granted. From the judgment thus entered the defendant has appealed.

In the absence of a contention that the coal-dock was improperly equipped or operated, but one question is presented, *viz.*: Can the defendant, under the circumstances pleaded, maintain its coal-dock as now, placed, without responsibility to the plaintiffs, notwithstanding that, though adequately equipped and carefully operated, injury and damage are caused to their property thereby? We think it can, for the following reasons: The defendant is the successor in interest of the Northern Pacific Railroad Company, which by the Act of Congress of July 2, 1864, was created a body corporate for the purpose of constructing and maintaining "a continuous railroad and telegraph line," was vested with all the powers, privileges and immunities necessary to accomplish that result, and was granted "the right of way through the public lands * * * to the extent of 200 feet in width on each side of said railroad," such railroad to be "constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances." So far as this Act constituted a grant, it was a [1] grant *in praesenti*; it took effect at the time the Act was approved; the title conveyed by it dates from that time, and the rights conferred upon the Northern Pacific Railroad Company, its successors and assigns, are subject to no conditions save those expressed or necessarily implied, such as the construction of the railway itself. (*Wilkinson v. Northern Pac. R. Co.*, 5 Mont. 538, 6 Pac. 349; *Nielsen v. Northern Pacific Ry. Co.*, 184 Fed. 601, 106 C. C. A. 581; *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 47 L. Ed. 1044, 23 Sup. Ct. Rep. 671; *Northern Pacific Ry. Co. v. Wadekamper*, 70 Wash. 392, 126 Pac. 909.) It was not, however, a mere donation; but,

founded on valuable considerations, it "stands upon a somewhat different footing from merely a private grant, and should receive a more liberal construction in favor of the purposes for which it was enacted." (*United States v. Denver & Rio Grande Ry. Co.*, 150 U. S. 1, 37 L. Ed. 975, 14 Sup. Ct. Rep. 11; *Moon v. Salt Lake County*, 27 Utah, 435, 76 Pac. 222.) Its scope as [2] applied to what may be called the incidents or appurtenances of the railroad has been thus expressed by this court: "It is a well-known and reasonable rule, in construing a grant, that, when anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also." Here is a grant of a right of way through the public lands 'for the construction of a railroad and telegraph.' Such a grant carries with it the right to the exclusive possession of the lands described for the purpose aforesaid; to make excavations, cuts and fills in the soil or ground; to construct a roadbed of suitable width and grade; to lay ties and rails thereon, and to erect upon the lands described, as and included in the right of way, all buildings, shops, water stations, depots, etc., necessary and suitable to be used in constructing or operating such railroad." (*Northern Pacific R. R. Co. v. Carland*, 5 Mont. 146, 169, 3 Pac. 134.) And the supreme court of the United States, construing a similar grant with reference to the authority to take from adjacent public lands, timber and other material necessary for the construction of the railroad, likewise holds that "the term 'railroad' fairly includes all structures which are necessary and essential to its operation." If, therefore, coal-docks are necessary to the maintenance of such a railroad as was authorized by the Act in question, it must be held that the erection and proper operation of coal-docks at places upon the right of way suitable to such purposes and whenever required, was in contemplation of the grant from the beginning. This conclusion becomes pertinent to the present case by virtue of the allegations of the answer, admitted by failure to reply, that the use of coal-docks at stations upon defendant's right of way is necessary to carry on its railroad, and for that purpose the coal-dock in question was placed and

is operated at its present location within the yards and upon the right of way of the defendant at the station of Missoula.

What, then, is the consequence, having in mind that at the time the grant was made not only the defendant's right of way but the lands now owned by the plaintiffs as well, were public domain, the lands now owned by the plaintiffs remaining such for sometime after the grant. Confessedly, the plaintiffs are in no better position to complain than the United States would be if these lands were still government property but covered by government buildings. Could the United States, the grantor of the defendant, successfully complain of the coal-dock as a nuisance asserting no broader grounds than are presented by this record? Respondents say yes, if the coal-dock was not in place when the government buildings were erected. But the general rule that a grant of land for railway purposes conveys the right to use such land not only for the passage of trains, but for the maintenance of such structures and machinery as may be required for railway purposes "prevents a grantor from successfully asserting a claim for damages for injury from noise, smoke and the like resulting from the proper operation of the road, and it precludes him from successfully prosecuting an action for a nuisance although annoyance from smoke, noise and similar things necessarily incident to the operation of the road, is suffered by him." (Elliott on Railroads, sec. 418; *Chicago etc. Ry. Co. v. Smith*, 111 Ill. 363.) If the location of the coal-docks upon the right of way, whenever and wherever they might be required for railway purposes, was contemplated by the grant, the subsequent erection of buildings by the grantor on lands retained, even though before the installation of any particular coal-dock, could not of itself affect the situation. This was decided in principle by *Kipp v. Davis-Daly Copper Co.*, 41 Mont. 509, 110 Pac. 237, wherein, touching the right of a city to authorize the use of its streets by a freight railway to the prejudice of abutting owners, this court said: "The respective rights of the abutting owner and the public are dependent upon the fact of dedication. In view of these provisions as well as of the rule of law recognized everywhere, the

authorities which control streets and highways may use or permit the use of them in any manner or for any purpose which is reasonably incident to the appropriation of them to public travel and to the ordinary uses of streets or highways under the different conditions which arise from time to time. For a highway is created for the use of the public, not only in view of its necessities and requirements as they exist, but also in view of the constantly changing modes and conditions of travel and transportation, brought about by improved methods and required by the increase of population and the expansion in the volume of traffic due to the ever-increasing needs of society. Were this not so, any change in these respects would require a readjustment of rights as between the public and the abutting property owner, because the result of it would of necessity be held an imposition of a new burden upon the highway, and hence upon the property of the abutting owner. For these changing public uses the owner must be presumed to have received compensation when the highway was created."

The same general reflections and the same rule are applicable to railroads. When the grant of a right of way is made to a railroad without restrictions, it contemplates not merely the railroad as it may be established in the first instance, but the railroad with all its necessary appurtenances as it may from time to time come necessarily to be. On this point the authorities are not at variance. Cases involving coal-docks are rare, it is true, but others no less in point are quite abundant. (*Illinois Cent. R. R. Co. v. Anderson*, 73 Ill. App. 621; *Kotz v. Illinois Cent. R. Co.*, 188 Ill. 578, 59 N. E. 240; *Gillespie v. Buffalo R. & P. Co.*, 226 Pa. 31, 74 Atl. 738; *Hileman v. Chicago etc. Ry. Co.*, 113 Iowa, 591, 85 N. W. 800; *White v. Chicago etc. R. Co.*, 122 Ind. 317, 7 L. R. A. 257, 23 N. E. 782; *Cassidy v. Old Colony R. R.*, 141 Mass. 174, 5 N. E. 142; *Western Union Tel. Co. v. Polhemus*, 178 Fed. 904, 29 L. R. A. (n. s.) 465, 102 C. C. A. 105; *Louisville & N. R. Co. v. Scomp*, 124 Ky. 330, 98 S. W. 1024.)

In view of the construction given in the *Carland Case* to the Northern Pacific grant, *Illinois Central R. R. v. Anderson*, *supra*, is singularly instructive. In 1853 one Cartwright granted to the railroad company a right of way across a certain tract "for the purpose of constructing, maintaining and operating thereon, a single or double track railroad, with all its necessary appurtenances, and for all uses and purposes connected with the construction, repair, maintenance and complete operation of said railroad." The railroad was built in 1856, at first with a single track. In 1859 a portion of Cartwright's land abutting on the right of way was platted as an addition to the town of Effingham and the title thereto passed to other parties, from whom, in 1888, the complainant acquired her premises, on which she erected her home. The town of Effingham became a city and the portion thereof occupied by the complainant was a populous portion of said city. The company added tracks from time to time to meet the local growth until the city became the end of a division, whereupon in 1895 the company put in a turntable with a switch leading thereto. The turntable was located about thirty feet from complainant's house, but it together with the switch leading to it were wholly upon the right of way. She alleged that the use of this switch and the turntable by the railway company brought the engines nearer to her house than formerly, kept them there longer, increased the noise, and cast upon her premises and into her house more or less gas, smoke and soot, and to an appreciable degree, added to the burden which up to that time had been borne by her property, and rendered it less valuable than it would be if not required to bear such burden. The court said: "It is not contended by appellee that the turntable and switch are improperly constructed, or that the engines upon them have at any time been negligently or improperly used or operated, or that because of any unlawful or wrongful act in the manner of construction or use, a nuisance exists; but that though constructed in a proper manner and used and operated in a proper way, the natural result of their construction and operation in so close proximity

to appellee's premises is a nuisance of which she can complain, and is an injury to her property, for which she can recover of appellant. The acts complained of here do not constitute a public nuisance nor a private nuisance that can be abated by law. The noise, gas, smoke and soot complained of may, in a sense, be a private nuisance but appellee derived her title through Cartwright after his grant to appellant, and if upon the facts shown he would have no standing in court, had he remained the owner, then the appellee can have none. This case does not fall within the rules applicable to such cases as where the grant was made for no specific purpose; where the grant was made by a stranger to the title of the party injured; where the grant was made by a city council or other legislative body, nor where the injury arises from improper construction or some want of proper care, or some negligence in the manner of its use. * * * Cases between a railroad company and a grantor or condemnee fall in the same class. In such cases the consideration for the grant or the damages assessed on condemnation include, once for all, the full compensation to be paid for any lawful use that fairly falls within the terms of the grant or the specifications of the condemnation. In the absence of improper manner of construction or negligence in the manner of use, the only question in such cases is, Are the terms of the grant, or the purposes specified in the condemnation, broad enough to include the uses complained of? The terms of Cartwright's grant are clearly broad enough to include the right in appellant to construct and use on its right of way, the turntable and switch complained of."

Counsel for plaintiffs argue strongly, and cite many authorities to the effect that no power exists in Congress or elsewhere to authorize the maintenance of a private nuisance; but that is not the question. The Act of July 2, 1864, is not only a legislative authorization to the Northern Pacific Railroad Company to construct and operate a railroad, but it is a grant from the United States, in its proprietary capacity, of certain lands for railroad purposes. Since this grant contemplated at the outset the construction and maintenance of such structures,

equipment and machinery as might be necessary for the operation of the railroad, and since the coal-dock in question is necessary for that purpose, the conclusion must be that the plaintiffs, as subsequent grantees of the land adjacent to defendant's right of way, taking title from the same source as the defendant, hold subject to the rights vested in it by the prior grant. (*Illinois Cent. R. R. v. Anderson, supra; Cassidy v. Old Colony R. Co., supra; Chicago etc. R. Co. v. Smith*, 111 Ill. 363; *Bennett v. Long Island R. Co.*, 181 N. Y. 431, 74 N. E. 418.) Plaintiffs, therefore, were not entitled to prevail upon the case presented by the pleadings.

The judgment appealed from is accordingly reversed and the cause is remanded, with directions to enter judgment for the defendant conformable to the stipulation of the parties.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STEVENS, RESPONDENT, v. NORTHERN PACIFIC RY. CO.,
APPELLANT.

(No. 3,496.)

(Submitted March 30, 1915. Decided April 21, 1915.)

[148 Pac. 396.]

*Northern Pacific Land Grant—Right of Way—Scope of Grant—
Rights of Subsequent Grantees—Damages to Property.*

[For syllabus, see *Smith et al. v. Northern Pacific Ry. Co.*, ante, p. 539.]

Appeal from District Court, Missoula County; R. Lee McCullough, Judge.

ACTION by A. M. Stevens against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Messrs. Gunn & Rasch and Mr. Wm. F. Wayne, for Appellant.

Messrs. Hall & Whitlock, for Respondent.

MR. JUSTICE SANNER delivered the opinion of the court.

It is conceded by the respondent, and is a fact, that the issues and history of this case are identical with those presented in *Smith et al. v. Northern Pacific Ry. Co.*, ante, p. 539, 148 Pac. 393, and on the authority thereof the judgment herein appealed from is reversed and the cause remanded for further proceedings.

Reversed and remanded.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
CONCUR.

STEIMAN, APPELLANT, v. THE MURRAY HOSPITAL,
RESPONDENT.

(No. 3,498.)

(Submitted April 1, 1915. Decided April 21, 1915.)

[148 Pac. 339.]

*New Trial—Insufficiency of Evidence—Affirmance of Order—
When Proper.*

1. Where, in an action for malpractice, the evidence preponderated decisively against the finding of the jury in favor of plaintiff, it was the duty of a district judge, called in to preside at the hearing of a motion for a new trial, to grant the same.

[As to liability of physicians and surgeons for negligence and malpractice, see notes in 48 Am. Dec. 481; 93 Am. St. Rep. 657.]

Appeal from District Court, Silver Bow County; Roy E. Ayers, Judge of the Tenth Judicial District, presiding.

ACTION by Julius Steiman against The Murray Hospital, a corporation. Judgment for plaintiff. Defendant appeals from an order granting a new trial. Affirmed.

Mr. Louis E. Haven and *Mr. E. F. Flynn*, for Appellant, submitted a brief and argued the cause orally.

Messrs. Walker & Walker and *Messrs. Nolan & Donovan*, for Respondent, submitted a brief; the former argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In this action the plaintiff seeks to recover damages of the defendant corporation for alleged malpractice. On April 19, 1909, during the course of his employment as a timberman in the Speculator mine, a property owned and operated by the North-Butte Mining Company at Butte, the plaintiff was caught by a fall of rock and sustained a compound comminuted fracture of the bones of his left leg below the knee. Under the terms of a contract theretofore made, and then existing, between the defendant and the mining company, the defendant was required to furnish medical or surgical treatment to any of the employees of the mining company who might become sick or sustain injury while in the discharge of their duties. When he was injured, the plaintiff was taken to defendant's hospital and received there for treatment. He remained there as an inmate until July 23, when he was discharged, but with permission—of which he availed himself—to return at stated intervals for such further attention as the condition of his leg required. Owing to conditions which had supervened requiring special attention, he was again admitted as an inmate on September 1. He was discharged again on September 29, but returned at intervals as before, for such treatment as, in the opinion of the surgeon in whose special charge he was, he needed, until about December 1, when he ceased his visits altogether.

The complaint contains two counts. In the first it is alleged that the defendant, through its employees, was guilty of such negligence in the setting of the bones of plaintiff's leg and in the subsequent treatment accorded him, that the bones failed to

knit and heal, to his damage in the sum of \$50,000. In the second it is alleged that on August 23, 1909, when the plaintiff was on a visit to the hospital for medical attention, T. J. Murray, the president of the defendant, while acting within the scope of his authority, refused him needed attention, assaulted and forcibly ejected him from the hospital, to his damage in the sum of \$1,000. Judgment is demanded for these sums and also for the sum of \$260, the amount plaintiff alleges he paid for medical services which he was compelled to obtain from other physicians in order to have his injury cured. The answer denies all the averments in the complaint, except the corporate capacity of defendant. The jury, besides answering certain special interrogatories in favor of plaintiff, returned a general verdict for \$17,000. Judgment was entered accordingly. Judge Lynch, who presided at the trial, having been disqualified, a motion for a new trial was heard and granted by Hon. Roy E. Ayers, judge of the tenth judicial district, called in by Judge Lynch to preside in his stead. The plaintiff has appealed.

While the motion was made upon all the statutory grounds, the briefs submitted to this court are devoted almost exclusively to a discussion of two of them only, viz., insufficiency of the evidence to justify the verdict, and excessive damages appearing to have been given under the influence of passion or prejudice, the main discussion being upon the former. As to the first ground, counsel for plaintiff insist that, since the evidence furnishes ample justification for the conclusion of the jury that the defendant was guilty of the negligence charged, or does not decisively preponderate against it, Judge Ayers erred in setting aside the verdict. On the other hand, counsel for defendant [1] assert that there is no substantial foundation in the evidence for the conclusion that the defendant was guilty of any delinquency whatever, either in failing to accord to the plaintiff, through its officers and employees, the best treatment that, considering the character of his injury, his case permitted or required, or in bringing to its aid every means that the most competent knowledge of medical science and skill in the practice

of it could suggest as useful. They also assert that there is no evidence showing, or tending to show, that the plaintiff suffered any violence at the hands of Murray as alleged. Hence they say Judge Ayers was not only justified in setting aside the verdict, but that it was his duty to do so. Of course, as counsel for plaintiff contend, Judge Ayers, limited as he was in his effort to ascertain the merits of the motion, to what is disclosed by the dead record, ought not to have interfered unless he was convinced that the evidence preponderates against the findings of the jury. (*Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76.) If such was his conviction, however, and it is justified by the record, his duty was clear and his action must be upheld.

We have made a careful study of the evidence, and our conclusion upon it is in harmony with that of Judge Ayers. Not only does it preponderate against the finding of the jury, but, in our opinion, decisively so. We shall not attempt to particularize any portion of it, or point out wherein it fails in material respects to enforce the conviction that the defendant wronged the plaintiff. This would necessarily involve an expression of opinion as to the value of parts of it which might result in embarrassment to one of the parties on another trial.

The order being justified on the ground of insufficiency of the evidence, it is not necessary to express an opinion as to whether the jury were influenced by passion or prejudice in fixing the amount of their verdict, or to notice other grounds of the motion.

The order is affirmed.

Affirmed.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

LEMMER, APPELLANT, v. THE "TRIBUNE" ET AL.,
RESPONDENTS.

(No. 3,500.)

(Submitted April 2, 1915. Decided April 23, 1915.)

[148 Pac. 338.]

*Libel—General and Special Damages—Complaint—Insufficiency.**Libel—Pleadings.*

1. Plaintiff in an action for libel can recover only, if at all, for the publication of the particular matter referred to in the complaint. Words not pleaded, though published at the same time, cannot be relied on.

[As to general rules applicable to libel, see note in 4 Am. Dec. 348.]

Same—General Damages—Language must be Libelous Per Se.

2. To state a cause of action for general damages for libel, the language complained of must be libelous *per se*; i. e., such as, without the aid of innuendo, imputes to plaintiff the commission of a crime or necessarily exposes him to hatred, contempt, ridicule or obloquy.

[As to what words are actionable *per se*, see notes in 1 Am. Dec. 448; 12 Am. Dec. 39; 41 Am. Rep. 590; 116 Am. St. Rep. 802.]

Same—What not Libelous Per Se.

3. *Held*, that language published by defendant the necessary inferences from which were that plaintiff died from an overdose of morphine, procured on a doctor's prescription by a stranger at plaintiff's instance, was not libelous *per se*.

Same—Special Damages—Complaint—Insufficiency.

4. Where special damages are sought for a libelous publication, the facts showing such damages must be alleged; hence a general allegation that plaintiff was damaged in his business in consequence of the publication of the article referred to above was insufficient in this respect.

Appeal from District Court, Cascade County; H. H. Ewing, Judge.

ACTION by Frank Lemmer against the "Tribune" and John A. Curry. From a judgment of dismissal, plaintiff appeals. Affirmed.

Mr. E. A. Smith, for Appellant, submitted a brief, and argued the cause orally.

In interpreting an alleged libelous publication the court will construe it in its ordinary and popular sense, and will read it exactly as in a newspaper out of court. The vice of a libel consists in the injury it inflicts upon the character, the feelings

and the business of the person concerning whom it is published. Manifestly, this will depend upon the interpretation that is placed upon it by the persons who read it; and those who read an alleged libelous publication will be presumed to be persons of common understanding. (*De Sando v. New York Herald Co.*, 88 App. Div. 492, 85 N. Y. Supp. 111; *Hotchkiss v. Olmstead*, 37 Ind. 74; *Bettner v. Holt*, 70 Cal. 270, 11 Pac. 713; *Tappan v. Wilson*, 7 Ohio, 190.)

Publications of rumors or hearsays or reports are libelous. An article is libelous though it purports to be and is the publication of a rumor only. (*Republican Pub. Co. v. Miner*, 3 Colo. App. 568, 34 Pac. 485; *Brewer v. Chase*, 121 Mich. 526, 80 Am. St. Rep. 527, 46 L. R. A. 397, 80 N. W. 575.) It is no defense that the defendant did not mean to libel plaintiff. (*Taylor v. Hearst*, 107 Cal. 262, 40 Pac. 392; *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 15 Am. St. Rep. 318, 43 N. W. 431; *Whiting v. Carpenter*, 4 Neb. (Unof.) 342, 93 N. W. 926.) In an action for defamation it is immaterial what meaning the speaker intended to convey. He may have spoken without any intention of injuring another's reputation, but if he has in fact done so, he must compensate the party. What was passing in his mind is immaterial, save in so far as his hearers could perceive it at the time. Words cannot be construed according to the secret intent of the speaker. The slander and the damage consists in the interpretation of the hearers. (*Berry v. Massey*, 104 Ind. 486, 3 N. E. 942; *Massuere v. Dickens*, 70 Wis. 83, 35 N. W. 349.)

Innuendo: The article complained of is fairly susceptible of a libelous construction without reference to any extrinsic fact or circumstance, and the innuendo fairly interprets its meaning; and more than this, the innuendo fairly sets forth the very meaning which is unmistakably pointed out in the article itself. Where there is no extrinsic fact or circumstance relied upon as giving to the publication a libelous meaning, the innuendo is simply a statement of the conclusion of the pleader as to the meaning of the language used. The purpose of the innuendo is

not to state facts, but to state the conclusion which the pleader draws from the language used. (13 Ency. Pl. & Pr. 54, 55; *Ayres v. Toulmin*, 74 Mich. 44, 41 N. W. 855; *Singer v. Bender*, 64 Wis. 169, 24 N. W. 903; *Price v. Conway*, 134 Pa. St. 340, 19 Am. St. Rep. 704, 8 L. R. A. 193, 19 Atl. 687.)

Messrs. Norris & Hurd and *Messrs. Freeman & Thelen*, for Respondents, submitted a brief; *Mr. E. L. Norris* and *Mr. Freeman* argued the cause orally.

Did the publication of the article in question expose the appellant to hatred, contempt, ridicule or obloquy or cause him to be shunned or avoided? To so hold would require the placing of an interpretation on the article not imputed by the words used. To constitute libel *per se*, the language used must require no interpretation; it must be viewed by the court as a stranger might look at it, without the aid of special knowledge possessed by the parties concerned and susceptible of but one meaning, and that which leads to the injurious consequences. (*Brown v. Independent Pub. Co.*, 48 Mont. 374, 138 Pac. 258.) The plaintiff evidently had in mind this fact, and the further fact that by the natural and usual interpretation, the article did not constitute libel. He sought by the allegation "meaning therein and thereby, that this plaintiff was and had been addicted to the use of 'dope' (morphine); that he had died from an overdose thereof; that he had purchased it clandestinely," which he employed by way of innuendo, to place upon the article a libelous import. "The innuendo cannot change the character of the publication. If it is not libelous *per se*, it cannot be made so by innuendo." (*Brown v. Independent Pub. Co.*, *supra*; *Continental Nat. Bank v. Bowdre*, 6 Tex. Civ. App. 349, 25 S. W. 131; *Cole v. Neustadter*, 22 Or. 191, 29 Pac. 550; *Stitzell v. Reynolds*, 59 Pa. St. 488; *Dixon v. State*, 81 Ala. 61, 1 South. 69; *Bradley v. Cramer*, 59 Wis. 309, 48 Am. Rep. 511, 18 N. W. 268; *Barnes v. State*, 88 Md. 347, 41 Atl. 781; *Dun v. Maier*, 82 Fed. 169, 27 C. C. A. 100; *Vickers v. Stoneman*, 73 Mich. 419, 41 N. W. 495; *Coburn v. Harwood*, Minor (Ala.), 93, 12 Am.

Dec. 37; *Gaither v. Advertiser Co.*, 102 Ala. 458, 14 South. 788; 25 Cyc. 450.)

In the second count of his complaint, appellant seeks to recover special damages on account of alleged loss to his business as a taxidermist. "To sustain the action on the ground of special damages it is necessary that the complaint should set forth precisely in what way such special damages resulted. It is not sufficient to aver generally that the plaintiff has suffered special damages or that he has been put to great cost and expense thereby. But it must be made to appear by proper averment how much special damages were occasioned." (5 Ency. Pl. & Pr. 767; 25 Cyc. 454-456; Newell on Libel & Slander, 866; *Walker v. Tribune Co.*, 29 Fed. 827; *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308; *Verbeck v. Duryea*, 36 Misc. Rep. 242, 73 N. Y. Supp. 346; *Jockin v. Brassler*, 114 App. Div. 177, 99 N. Y. Supp. 586; *Kansas City etc. R. Co. v. Delaney*, 102 Tenn. 289, 52 S. W. 151; *Brinkmann v. Taylor*, 103 Fed. 773; *American Ins. Co. v. France*, 111 Ill. App. 382; *Reinboth v. Ederheimer*, 134 N. Y. Supp. 16.)

MR. JUSTICE SANNER delivered the opinion of the court.

Action for libel. The complaint is in two counts. The first count charges that on December 24, 1913, in the Great Falls "Tribune," the defendants published of and concerning the plaintiff the following false and unprivileged matter, to-wit: "Some months ago there was quite a sensation sprung in this city when Frank Lemmer, a taxidermist, died from an overdose of morphine which he had secured at a drug-store on the prescription of a local doctor whom it was claimed had written the prescription for \$1 when asked for it by a man who was an entire stranger to him. The man who got the prescription was also a stranger to Lemmer and went to the doctor at Lemmer's request"; that by such publication the defendants meant that the plaintiff "was and had been addicted to the use of 'dope' (morphine)," had died from an overdose thereof and had purchased it clandestinely; that by such publication plaintiff "has

been exposed to hatred, contempt, ridicule and obloquy and has been injured in his occupation; • • • has suffered and will continue to suffer great mental anguish, great humiliation, shame and disgrace, and loss to his business, all to plaintiff's damage in the sum of \$25,000." The second count alleges the same publication without any innuendo; pleads that he is a taxidermist by occupation, maintaining a store and factory at Great Falls; that his principal source of income as a taxidermist is derived from points outside of Great Falls and in territory where the "Tribune" enjoys a wide circulation; that his business is such that he is engaged because of his personal attention and ability therein, and depends largely upon his good reputation; that he has resided in Montana many years and has a large circle of friends and business acquaintances; that the publication was willful and malicious and has exposed him to the hatred, contempt and ridicule of his friends, acquaintances and business associates, and has caused him to be shunned and avoided, and has injured him in his business, to his damage in the sum of \$25,000.

The defendants demurred both generally and specially. The demurrer was sustained. The plaintiff, declining to plead further, suffered judgment of dismissal with costs. This appeal is from the judgment.

We are at a loss to understand the plaintiff's tactics in this case. Upon the bare chance that the trial court might be found in error in sustaining the demurrer, and without any necessity for so doing, he obstinately stands upon a complaint which, to say the least, was not in form most advantageous to him. We say without necessity, for, judging from his brief as filed in this court, he had a cause of action capable of being clearly and effectively stated. Our functions, however, are now limited to a determination whether there was error in sustaining the demurrer, and this we proceed to do.

It is an elementary rule of pleading in actions for libel that the plaintiff must recover, if at all, for the publication of the [1] particular matter referred to in the complaint. (25 Cyc.

447; 13 Ency. Pl. & Pr. 45.) Other actionable words not pleaded, though published at the same time, cannot be made the basis of recovery. (*Rundell v. Butler*, 7 Barb. (N. Y.) 260; *Gray v. Nellis*, 6 How. Pr. (N. Y.) 290; *Howard v. Sexton*, 4 N. Y. 157; *Harris v. Zanone*, 93 Cal. 59, 28 Pac. 845; *Pollard v. Lyon*, 1 McArth. (D. C.) 296.) In the first count of the [2] complaint, the damages claimed are general, not special. To state a cause of action for such damages, the language complained of must be libelous *per se*, and to be libelous *per se* the language must be such as, without the aid of innuendo, imputes to the aggrieved party the commission of a crime or necessarily exposes him to hatred, contempt, ridicule or obloquy. (*Brown v. Independent Pub. Co.*, 48 Mont. 374, 138 Pac. 258; *Cooper v. Romney*, 49 Mont. 119, 141 Pac. 289.) The necessary inferences from the words in question are, that Frank Lemmer died; that he died from an overdose of morphine; that the morphine was procured on a doctor's prescription, which prescription was obtained at Lemmer's instance by a stranger. None of these circumstances, nor all of them taken together, necessarily suggest anything criminal or disgraceful. It is no dishonor to die, and one may die without moral turpitude from an overdose of morphine procured on a doctor's prescription, even though a stranger acted as the messenger in the transaction.

The second count is an attempt to plead special damages on [4] account of loss to plaintiff in his business. Speaking generally, there is no doubt that one may suffer such damages from almost any publication whatever, particularly a publication to the effect that he is dead; but whenever such damages are sought, it is not enough to aver generally that in consequence of the publication the plaintiff has been damaged in his business; the facts showing such damages must be alleged or no cause of action is stated. (*Ledlie v. Wallen*, 17 Mont. 150, 42 Pac. 289; *Brown v. Independent Pub. Co.*, *supra*; *Walker v. Tribune Co.*, 29 Fed. 827.) No such facts are made to appear in the second count.

It follows that the demurrer to the complaint was properly sustained. The plaintiff's refusal to plead further justified the judgment appealed from, and the same is therefore affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY
concur.

DESCHAMPS ET AL., RESPONDENTS, v. LOISELLE,
APPELLANT.

(No. 3,499.)

(Submitted April 1, 1915. Decided April 26, 1915.)

[148 Pac. 335.]

*Corporations—Contracts—How Enforced—Directors—Powers
and Duties—Stockholders—Right to Sue.*

Corporations—Contracts—How Enforced.

1. Like the agreement to take stock in a corporation to be formed, so one to the effect that the cost of constructing an irrigation project and the expense of maintaining it should be distributed among the stockholders in proportion to the number of shares held by each, is not a contract between the shareholders enforceable by one or more of them against the others, but one enforceable only by the corporation.

[As to when corporation must carry out contracts of promoters or members, see note in 13 Am. St. Rep. 28.]

Same—Directors—Duties not Delegable.

2. Though it is competent for the directors of a corporation to conduct its business through duly authorized agents, they cannot abdicate their duties nor permit others to act in their stead for the corporation or the stockholders.

[As to actions by corporation on behalf of stockholders, see note in 97 Am. St. Rep. 29.]

Same—Stockholders cannot Sue, Until When.

3. Stockholders cannot sue on behalf of the corporation until they have applied to the officers and directors for relief and have met with a refusal, or it is apparent that application to them for relief would be useless.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

ACTION by Gaspard Deschamps and others against Philias Loisel. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Mr. Theodore Lentz, for Appellant, submitted a brief; *Mr. Derwood Washington*, of Counsel, argued the cause orally.

Before stockholders may have recourse to the courts for redress of their grievances as to corporate affairs, they must first exhaust their remedy within the corporation itself. (*Brandt v. McIntosh*, 47 Mont. 70, 130 Pac. 413.)

By-laws adopted before incorporation are invalid. (Machen on Corporations, sec. 689; *Vercoutere v. Golden State Land Co.*, 116 Cal. 410, 48 Pac. 375; *Boston Acid Mfg. Co. v. Moring*, 15 Gray (Mass.), 211, 214; Rev. Codes, sec. 3829.)

The agreement in question is one between prospective stockholders to form a corporation, and is supported by the mutual promises of each until the corporation is launched, after which time all the rights and obligations created by it are merged into and supported by the new rights and liabilities of stockholder and corporation. (9 Cyc. 595; Thompson on Corporations, 2d ed., sec. 543.) Agreements of this nature have come before the courts most frequently in suits by corporations on agreements to take stock made by prospective stockholders among themselves before the corporation came into existence. (*Intermountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20; *Athol Music Hall Co. v. Carey*, 116 Mass. 471; *Penobscot R. R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Minneapolis Threshing Machine Co. v. Davis*, 40 Minn. 110, 12 Am. St. Rep. 701, 3 L. R. A. 796, 41 N. W. 1026; *Branch v. Augusta Glass Works*, 95 Ga. 573, 23 S. E. 128; *Edinboro Academy v. Robinson*, 37 Pa. St. 210, 78 Am. Dec. 421; *Security State Bank v. Raine*, 31 Neb. 517, 48 N. W. 262; *Marysville Elec. Light & Power Co. v. Johnson*, 93 Cal. 538, 27 Am. St. Rep. 215, 29 Pac. 126; *Ashuelot Boot etc. Co. v. Hoyt*, 56 N. H. 548; *San Joaquin Land & Water Co. v. West*, 94 Cal. 399, 29 Pac. 785; *San Joaquin Land & Water Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349.)

Messrs. Woody & Woody and *Messrs. Tolan & Gaines*, for Respondents, submitted a brief; *Mr. R. F. Gaines* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action to recover for moneys paid out by plaintiffs for the use and benefit of defendant. It is sought to fix liability upon the defendant under the terms of a written agreement which was entered into by some of the plaintiffs, the predecessors of others, and the defendant on November 22, 1901, the provisions of which, omitting formal parts, are the following:

"Whereas, all of the persons above named are desirous of forming a corporation under the incorporation laws of the state of Montana, to be known as 'Grass Valley French Ditch Company,' for the purpose of acquiring a right to use the waters of the Hell Gate river for agricultural, mechanical and other useful and beneficial purposes, and to build a dam on the land of Alex Jette for the purpose of diverting said water from said river, and to building a ditch to carry the same from said place of diversion to Grass Valley, and from that point to build two ditches to be known as the 'Upper Ditch' and 'Lower Ditch' for the purpose of conveying the water on to the lands of the above named parties;

"Now, therefore, the said parties do hereby mutually agree each with the other, for and in consideration of the mutual advantage to be derived by each from the formation of said corporation and the building of said ditches, and bind ourselves jointly and severally to do and perform each the matters and things hereinafter mentioned and contained as follows:

"The said Alex Jette agrees with each of the other parties hereto that he will furnish for the use and benefit of said corporation hereafter to be formed as aforesaid, a site and place on his land on the Hell Gate river for the construction of a dam and headgate to take the water from said Hell Gate river to supply said ditch and ditches to be built and constructed as

aforesaid, and to furnish said dam site free of cost to said corporation and free of cost to the parties to this agreement.

“And that each and every one of the parties to this agreement mutually agree, each with the other, and promise to the effect; that in case said ditch or ditches, to be built and constructed as aforesaid, shall pass over or across any of the land or lands of any of the parties to this agreement that each of said parties whose land or lands said ditch or ditches shall pass over or across shall, free of charge, donate to said corporation a right of way for said ditch, or ditches and shall as soon as the line of said ditch or ditches is surveyed and definitely located, make, execute and deliver to said corporation a good and sufficient deed for said right of way.

“And it is further agreed by and between the parties hereto, that each of the parties who shall sign this agreement, shall bind himself and by these presents does bind himself to subscribe for, take and pay for the number of shares of stock in said ditch company as is set opposite his name to this agreement, and at the price of Five Dollars (\$5.00) for each share, one-half of the price of said shares to be paid in cash, and the other one-half to be paid in work on said dam and ditches, at a price for said work to be hereafter fixed by the board of trustees of said ditch company, but with the privilege of paying the whole amount in cash.

“And it is further mutually understood and agreed by each and all of the parties to this agreement that each share of stock of said company shall represent one inch of water, and that each share of stock of said company shall be of the par value of Five Dollars (\$5.00).

“And it is further mutually agreed and understood by and between the parties to this agreement that the cost of surveying said ditch or ditches, and the building of the dam and headgate to take the water from said Hell Gate river shall be paid for by all the parties holding stock in said company and that each shall pay the cost of the same in proportion to the number of shares of stock which he shall hold in said ditch company.

"And that each stockholder shall pay his proportionate share of the construction of said ditch, or ditches, from the point where the water leaves the headgate at the dam, down to the point where the ditch reaches the lower line of the land of each stockholder; said cost to be apportioned to each stockholder in proportion to the number of shares in said ditch company held by him; provided, however, that Alex Jette shall only be required to pay his proportionate part of the construction of said ditch from the point where the water leaves said headgate down to the point where he takes his water from said ditch; and that all repairs that shall be made upon said ditch from time to time shall be apportioned and paid in the same manner as the cost of construction said ditch was apportioned and paid," etc.

The corporation was organized, and the construction work necessary to effectuate its purpose having been done, it has since continued to be and now is a body corporate. Of the plaintiffs, only nine were among the original parties to the agreement. Altogether they own all the shares of stock (3,605) issued at the date of the organization, except 325 shares owned by defendant. He was among the original parties to the agreement, subscribing for 100 shares. He subsequently acquired 225 shares from two others of the original parties. The complaint, after reciting in substance the foregoing, alleges: That in the spring of 1911, it became necessary to make certain repairs on the ditches and their appurtenances; that the plaintiffs, in pursuance of the agreement, employed the teams and laborers required, furnished the necessary material and caused the repairs to be made at a reasonable and necessary cost of \$3,958.52; that thereafter the total cost was apportioned among the several plaintiffs and the defendant, the amount charged to each being determined by the number of shares owned by him, as provided in the agreement; that the amount due from the defendant thus ascertained was the sum of \$323.14; that the plaintiffs paid this amount for the use and benefit of the defendant, and that, though demand was made upon him for reimbursement, defendant refused to comply. In

a second count, plaintiffs seek recovery of the sum of \$88.99, defendant's proportionate share of expenditures for repairs made by plaintiffs upon the ditches and appurtenances during the year 1913. The trial court, having overruled demurrers interposed to each count, the defendant declined to plead further. Thereupon his default was entered and judgment was rendered for plaintiffs for both the amounts demanded, with interest thereon from the respective dates upon which defendant refused payment. The defendant has appealed from the judgment.

The complaint does not disclose the amount of the capital stock of the corporation, nor the number of shares represented by it, nor the number of shares which have been issued, nor whether there are shareholders other than the plaintiffs and the defendant. It does not appear whether the expenditures for repairs were authorized by the board of directors or not; nor is there any allegation that the plaintiffs have sought redress through the corporate authorities. The theory of the action is that by signing the agreement, each of the original parties bound himself to all of the others to contribute to the maintenance of the corporate enterprise without the necessity of consulting the corporate authorities. In other words, while the agreement contemplated the formation of the corporate body which was to become the owner of the dam site, the rights of way, the ditches and the usufruct of the water, the management of its affairs, in so far as is necessary to provide for the expense of maintenance is concerned, is in the exclusive control of the original signers of the agreement. It is to be noted, too, that this theory involves the assumption that anyone who has acquired, by purchase or otherwise, shares of stock from one of the original parties, *ipso facto* becomes bound by the agreement, and that, too, without any stipulation therein to that effect. If this is the correct view of it, the corporation has nothing to do with the control and maintenance of its property. The parties to the agreement for themselves and their successors as stockholders, retain control. Except to authorize the bring-

ing and defending of actions to protect the property, the board of directors is without authority, and the code of by-laws a useless form, except perhaps to control the distribution of water. The result is the anomaly of a corporation fully organized, with the officers designated by law for the control of its affairs, without any authority to do so; for the agreement as construed by the plaintiffs must be held exclusive upon the subject of maintenance and the mode of enforcing contribution from the stockholders.

The agreement is twofold. It amounts to a subscription to the stock of the corporation to be thereafter formed, and an [1] agreement that the cost of accomplishing the undertaking and that incident to its maintenance must be distributed among the stockholders in the proportions indicated. Now, it is well settled that a preliminary agreement to form a corporation and to take stock in it is not a contract by the subscribers with each other, enforceable by one or more of them against the other. Such an agreement can be enforced by the corporation only, and this is true whether the agreement is expressly authorized by statute or not. (Thompson on Corporations, 2d ed., sec. 543.) This was recognized as the settled rule by the supreme court of the territory of Montana in the early case of *Intermountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20. Until the proposed corporation is formed, the promise of the subscriber is in the nature of an open offer to the corporation, which may or may not be accepted; but if it has been accepted and acted upon by the subscribers or the person or persons authorized to form the corporation, the law implies an acceptance by the corporation and it then becomes irrevocable. (*Intermountain Pub. Co. v. Jack*, *supra*; *Athol Music Hall v. Carey*, 116 Mass. 471; *San Joaquin Land & W. Co. v. Beecher*, 101 Cal. 70, 35 Pac. 349; *Edinboro Academy v. Robinson*, 37 Pa. St. 210, 78 Am. Dec. 421.)

The promise as to the expense of construction and maintenance stands upon the same footing as the promise to take stock; there is nothing to indicate any other intention. On the con-

trary, every other obligation assumed by any of the parties would have been enforceable by the corporation only. It cannot be questioned that the corporation alone could have enforced the stipulation by Jette to furnish the dam site and the agreement of the other parties to grant rights of way, the same as the respective agreements to take and pay for stock. Indeed, it seems manifest that the real purpose was to impose upon the corporate authorities the obligation to pursue the method outlined in the agreement in providing for the cost of the enterprise, all the parties recognizing the fact that, inasmuch as some of them would use water at a greater distance from the head of the ditch than would others, they should bear a proportionately larger share of the cost of the preliminary and the subsequent outlay. Whether this could be legally done by by-law or resolution we need not now stop to inquire. It is sufficient to say that the intention was to bind the corporation to this course and not to impose mutual liability to each other, upon the individual signers of the agreement. That the parties evidently intended to do this is conclusive against the notion that they can maintain this action as upon a mutual promise, each to the other, that they would personally manage and control the business of the corporation.

Aside from this consideration, there is a conclusive reason why plaintiffs cannot maintain the action. Section 3833 of the [2] Revised Codes expressly declares: "The corporate powers, business and property of all corporations formed under this title must be exercised, conducted and controlled by a board of not less than three nor more than thirteen directors, to be elected from among the holders of stock, or where there is no capital stock, then from the members of such corporations." It further provides that "unless a quorum (a majority of the directors) is present and acting, no business performed or act done is valid as against the corporation." While it is entirely competent, indeed often necessary, for the directors to manage and conduct the business of the corporation through duly authorized agents, the directors themselves are the agents ulti-

mately responsible. They, therefore, cannot abdicate their duties nor permit others to act in their stead for the corporation or the stockholders. This would be in direct violation of the injunction of the statute, which, being exclusive, is also mandatory. If the construction of the agreement contended for by counsel, and adopted by the trial court, should be upheld, the statute would be set aside. It would be a possible, nay a probable, result that any one or more of the stockholders, deeming it necessary to make repairs, would, without the consent of the others or even against their protest, procure the expenditure of labor and the furnishing of material, the price for which would become a lien upon the property of the corporation under the statute (Rev. Codes, sec. 7290), and it would thus be encumbered without the consent either of a majority of the stockholders or the directors. Therefore, whatever purpose the signers of the agreement had in mind, it may not be given the construction for which counsel contend.

It is clear, also, that the action cannot be maintained as one brought in behalf of the corporation, because it does not purport to be such. It is no longer open to question in this jurisdiction that stockholders have no standing in court to sue on behalf of the corporation until they have applied to the officers and directors for relief and have been answered by a refusal, or the course of conduct being pursued by the latter is such as would render an application for relief fruitless. (*McConnell v. Combination Min. & M. Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194; *Brandt v. McIntosh*, 47 Mont. 70, 130 Pac. 413; *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071; *Kleinschmidt v. American Min. Co.*, 49 Mont. 7, 139 Pac. 785.)

The judgment is reversed and the cause is remanded, with directions to sustain the demurrers.

Reversed and remanded.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

CITY OF BUTTE, RESPONDENT, v. MONTANA INDEPENDENT TELEPHONE CO. ET AL., APPELLANTS.

(No. 3,504.)

(Submitted April 2, 1915. Decided April 26, 1915.)

[148 Pac. 384.]

Telegraphs and Telephones—Cities and Towns—Placing Wires Underground—Ordinances—Constitution—Police Power.

Telegraphs and Telephones—Cities and Towns—Placing Wires Underground—Constitution.

1. *Held*, that a city ordinance requiring wires used for the transmission of electricity for telegraph and telephone purposes, among others, to be placed underground in the congested business district, and providing punishment for disobedience, was a valid exercise of the police power, and that the contention that section 14, Article XV of the state Constitution, lodged the authority to regulate the telegraph and telephone business exclusively in the legislature, had no merit.

[As to poles and wires of telegraph and telephone companies in streets and highways and across private property, see note in 28 Am. St. Rep. 229.]

State Constitution—Nature of Instrument.

2. Speaking generally, the state Constitution is a limitation and not a grant of powers.

Telegraphs and Telephones—Regulation—Cities and Towns—Powers.

3. By subdivisions 8 and 43, section 3259, Revised Codes, cities and towns are given the power to regulate the use of streets by the erection of telegraph or telephone poles, the stringing of wires thereon, *etc.* By section 4400 certain rights of telephone, telegraph and other companies are defined, the section concluding: "Nothing herein shall be so construed as to restrict the powers of city or town councils." *Held*, that by this latter provision the legislature meant to preserve to cities and towns the police powers granted in the subdivisions above.

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

ACTION by the City of Butte against the Montana Independent Telephone Company and F. E. Farwell, its local manager. From a judgment finding defendants guilty of the violation of a city ordinance, and from an order denying them a new trial, defendants appeal. Affirmed.

Mr. John F. Davies and *Mr. T. J. Davis*, for Appellants, submitted a brief; *Messrs. Gunn, Rasch & Hall*, of Counsel; *Mr. M. S. Gunn* and *Mr. Davis* argued the cause orally.

The powers of the municipality or those expressly given by the state, or which may be fairly implied, to carry out powers expressly granted, are those indispensable to the declared objects and powers of the municipality. (*Mt. Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699; *Himmelmänn v. Hoadley*, 44 Cal. 213; *Oakland v. Carpentier*, 13 Cal. 540; *Lucas v. San Francisco*, 7 Cal. 463; *Argenti v. San Francisco*, 16 Cal. 255; *Poillon v. Brooklyn*, 101 N. Y. 132, 4 N. E. 191; *Ogden City v. Bear Lake etc. Irr. Co.*, 16 Utah, 440, 41 L. R. A. 305, 52 Pac. 697; *Gilman v. Milwaukee*, 61 Wis. 588, 21 N. W. 640.) Municipal powers are to be strictly construed, and if doubtful as to existence, will not be allowed. (*Douglass v. Placerville*, 18 Cal. 643; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720; *In re Lee Tong*, 18 Fed. 253, 9 Saw. 333; *Tatum v. Tamaroa*, 14 Fed. 103, 9 Biss. 475; *Parker v. Baker*, Clarke Ch. (N. Y.) 223.) Ordinarily, an act of incorporation vesting the corporation with certain powers does not divest the state nor its courts of the power vested in them by the general law of the state, unless the act of incorporation so declares. (*Baldwin v. Green*, 10 Mo. 410.) It is essential to the validity of municipal ordinances that they should be consistent with federal and state Constitutions, and with the general laws enforced throughout the state. (*Los Angeles County v. Hollywood Cemetery Assn.*, 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; *Ex parte Lacey*, 108 Cal. 326, 49 Am. St. Rep. 93, 38 L. R. A. 640, 41 Pac. 411; *Foster v. Board of Police*, 102 Cal. 483, 41 Am. St. Rep. 194, 37 Pac. 763; *Ex parte Sing Lee*, 96 Cal. 354, 31 Am. St. Rep. 218, 24 L. R. A. 195, 31 Pac. 245; *Ex parte Solomon*, 91 Cal. 440, 27 Pac. 757; *Spring Valley Waterworks v. Bartlett*, 16 Fed. 615, 8 Saw. 555; *National Bank of Commerce v. Granada*, 48 Fed. 278.)

In view of the declaration in section 14, Article XV, Constitution, and the apparent regulation of the subject, by the legisla-

ture, the power has been retained to regulate this subject by the legislative assembly, and a power so conferred and retained cannot be delegated. (*Johnson v. City of Great Falls*, 38 Mont. 369, 16 Ann. Cas. 974, 99 Pac. 1059; *Jernigan v. City of Madisonville*, 102 Ky. 313, 39 L. R. A. 214, 43 S. W. 448; *Carlson v. City of Helena*, 39 Mont. 82, 17 Ann. Cas. 1233, 102 Pac. 39.)

A general grant of powers by the state to a municipal corporation should not be held to confer authority upon the corporation to make an ordinance punishing an act which is already regulated by the general laws of the state. (Dillon on Municipal Corporation, 5th ed., sec. 632; *Southport v. Ogden*, 23 Conn. 128; *Ex parte Solomon*, 91 Cal. 440, 27 Pac. 757; *Moran v. Atlanta*, 102 Ga. 840, 30 S. E. 298; *Strauss v. Waycross*, 97 Ga. 475, 25 S. E. 329; *Kassell v. Savannah*, 109 Ga. 491, 35 S. E. 147; *Hood v. Von Glahn*, 88 Ga. 405, 14 S. E. 564; *State v. Nashville*, 15 Lea (Tenn.), 697, 54 Am. Rep. 427; *State v. Langston*, 88 N. C. 692; *Judy v. Lashley*, 50 W. Va. 628, 57 L. R. A. 412, 41 S. E. 197.)

"Where a right or privilege has been acquired by an individual or corporation from the common council of a state, under an Act of the legislature authorizing or granting such a privilege, and if the power to repeal is not reserved, such right so vested cannot be taken away." (*Brooklyn Cent. Ry. Co. v. Brooklyn City Ry. Co.*, 32 Barb. (N. Y.) 358; *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 L. R. A. 255, 18 N. E. 692.) "Such a contract, if within the power of a municipality to grant without reserving the power of revocation, or limitations as to time, would create in the grantee an immediate freehold interest in the streets and the rights to use them perpetually." (*Mil-hau v. Sharp*, 27 N. Y. 611, 84 Am. Dec. 314; *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629.) "Where the city has given the right to lay double tracks in a street, it cannot later be changed to one, if the company has gone to the expense of installing two." (*Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144, 31 Am. Rep. 145.)

An ordinance invalid and unconstitutional in its inception because of lack of power in the municipality to pass such an ordinance, and for a further reason that it controvenes an Act of state law, cannot be made valid and constitutional by a later state statute giving or attempting to delegate the power from the state to the municipality, which had previously existed in the state only, and which, by an unconstitutional ordinance, the municipality had attempted to usurp. (*Croft v. Danbury*, 65 Conn. 294, 32 Atl. 365; *Stange v. Dubuque*, 62 Iowa, 303, 17 N. W. 518; *Cain v. Goda*, 84 Ind. 209.)

Messrs. Alexander Mackel, Wm. F. Davis and N. A. Rotering, for Respondent, submitted a brief; *Mr. Davis* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The Montana Independent Telephone Company and Frank E. Farwell, its local manager, were adjudged guilty of violating Ordinance 1030 of the ordinances of the city of Butte, and appealed from the judgment and from an order denying them [1] a new trial. The ordinance in question defines the boundaries of the congested business district in Butte, requires all corporations or individuals maintaining wires within that district for the transmission of electricity for light, heat, power, telephone, telegraph or other purposes, except trolley wires for street railways, to place such wires underground, and provides punishment for disobedience. These appeals challenge the validity of that ordinance.

Our state Constitution (Art. XV, sec. 14) provides: "Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this state, and connect the same with other lines; and the legislative assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section."

It is the contention of appellants that the authority to prescribe regulations for the conduct of the telephone and telegraph business is by this provision lodged in the legislature, and since the provision is mandatory and prohibitory (Const., Art. III, sec. 29), the legislative power is exclusive, and cannot be delegated to, or conferred upon, any other body. If this premise is sound, it follows as of course that a city cannot impose any regulations whatever upon either of these industries or interfere in any manner with the conduct of their business, and that a corporation or individual engaged in operating a telegraph or telephone, may enter a city within the state, place its poles, piers and abutments in the streets at will, and prosecute the business without let or hindrance from the city authorities. To sustain this theory, however, involves a complete reversal of the policy pursued since the Constitution was adopted, and likewise the overruling of two recent decisions by this court.

It is a part of the history of this state that since 1889 cities have continuously exercised some measure of regulatory control over the telegraph and telephone business. In *State ex rel. Rocky Mt. Bell Tel. Co. v. Mayor etc. of the City of Red Lodge*, 30 Mont. 338, 76 Pac. 758, the telephone company not only recognized the authority of the city to prescribe reasonable regulations for the use of its streets and alleys by the company in erecting poles and other appliances for the wires necessary in the conduct of its business, but instituted *mandamus* proceedings to compel the city to exercise such authority. This court upheld the company's contention, and ordered the peremptory writ to issue, directing the city to designate the places in its streets and alleys where the necessary poles and other appliances might be placed. After considering the question at some length, it was said: "The city council has a twofold duty to perform; (1) To permit the corporation to enter the city; and (2) to designate the location of poles, abutments, etc. It does not possess the power to prohibit the one any more than it does to refuse the other. The municipality may, in the exercise of its power, prohibit the erection of these poles in places or in

a manner which will incommode the public; but they cannot entirely prohibit. They can only regulate, and the regulation must be reasonable." The suggestion of the proposition is its own answer. If the city had no authority to regulate the placing of telephone poles in its streets and alleys, then it could not owe a duty to prescribe the regulations enjoined upon it by this court.

In *State ex rel. Crumb v. City of Helena*, 34 Mont. 67, 85 Pac. 744, proceedings similar to those involved in the Red Lodge case were before us, and again we directed a peremptory writ of mandate to issue and compelled the city of Helena to designate the places in its streets and alleys where the poles and other necessary appliances might be erected to which to attach wires for the installation of a telephone system. The writ of mandate issues only to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. (Rev. Codes, sec. 7214.) A city of this state either has authority to make and enforce any reasonable police regulations affecting telegraphs and telephones, or it has no authority whatever in the premises. In each of the foregoing cases we held, not only that a city has authority to prescribe reasonable regulations affecting the telephone and telegraph business, but that the duty to exercise that authority is specially enjoined by law. We would not hesitate to overrule those decisions if convinced that they are erroneous; but of their correctness we entertain no doubt, and are unable to agree with appellants that the authority to regulate these industries is vested in the legislature, under such circumstances that no part of it can be delegated to, or conferred upon, the cities of the state.

Ordinance 1030 is a police regulation, and it is the general rule that unless specifically restricted by the Constitution, the legislature may delegate to municipal corporations the authority to exercise the police power through the instrumentality of reasonable rules and regulations. (*In re O'Brien*, 29 Mont. 530, 1 Ann. Cas. 373, 75 Pac. 196; *Johnson v. City of Great Falls*, 38 Mont. 369, 16 Ann. Cas. 974, 99 Pac. 1059.)

Speaking generally, our Constitution is one of limitations. [2] (*Northern Pacific Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386.) All power is reserved to the people unless provision is made to the contrary. Our legislature may enact laws upon any subject, unless the Constitution of this state or the supreme law of the land presents some obstacle. In the first portion of the section quoted above, the Constitution has withheld one subject from legislative interference. The right of a corporation or an individual to construct and maintain telephone and telegraph lines in this state and connect with other lines is specifically granted. It is true that this granting clause is not self-executing; and while the legislature might by its failure to act render the grant useless, it cannot by any legislative action impair the right, or interfere with its exercise. (*State ex rel. Rocky Mt. Bell Tel. Co. v. Mayor etc. of the City of Red Lodge*, above.) The provision quoted, however, does not assume to confer power upon the legislature. After defining the grant, the language is: "And the legislative assembly shall by general law of uniform operation provide reasonable regulations to give full effect to this section." The term "regulations" is not employed in any restrictive sense. It means "rules." But the legislature is not enjoined to make all needful rules for the management or control of telegraphs and telephones, but only such rules as are necessary to make the grant effective. Any statute which would enable a telephone company, a telegraph company, and any individual or individuals engaged in the telegraph or telephone business, to build, equip and operate necessary lines and connect with other lines, would meet fully the constitutional requirement, as for instance, a statute empowering such a corporation or individual to invoke the power of eminent domain and to use or cross the public thoroughfares. Such effective legislation was enacted in 1895 (secs. 1000, 1001, Civ. Code; sec. 2211, Code Civ. Proc.); but the manner in which the right, when made effective, should be exercised was left for proper legislative control without restriction. In *State ex rel. Crumb v. City of Helena* above, we construed this constitutional

mandate to require only such legislation as would give full force and effect to the grant; and we are satisfied that the construction was the correct one.

That the telegraph and telephone business is subject to police regulations, is maintained generally. (*Northwestern Tel. Exch. Co. v. Minneapolis*, 81 Minn. 140, 53 L. R. A. 175, 83 N. W. 527, 86 N. W. 69; 37 Cyc. 1629.)

In the absence of any constitutional restriction, the authority of the legislature to confer upon cities the power to prescribe and enforce reasonable police regulations for the telegraph and telephone business must be conceded.

It is further insisted that if the legislature has authority to confer such power upon cities, it has not done so; but with [3] this contention we do not agree. In 1895 the legislature enacted section 4800, Political Code (Rev. Codes, sec. 3259), which provides, among other things: "The city or town council has power: * * * 8. To provide for and regulate street crossings, curbs and gutters; to regulate and prevent the use or obstruction of streets, sidewalks and public grounds, by signs, poles, wires, posting hand bills or advertisements, or any obstruction. * * * 43. To regulate or suppress the erection of poles and the stringing of wires, rods or cables in the streets, alleys, or within the limits of any city or town." With knowledge that these statutes were in full force and effect, the legislature in 1907 enacted what is now section 4400, Revised Codes, which defines certain rights of a telegraph, telephone, electric light or electric power line corporation, or a person owning or operating such, and then concludes: "Nothing herein shall be so construed as to restrict the powers of city or town councils." By the use of this language the legislature must have intended to leave cities and towns a free hand to exercise the police powers granted in subdivisions 8 and 43 above; otherwise the expression is meaningless.

Ordinance 1030 is not attacked as unreasonable, and assuming that it is reasonable, the authority of the city to enact and

enforce it is clear, and the conviction of these appellants for their disobedience was proper.

The judgment and order are affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Rehearing denied July 7, 1915.

STATE, EX REL. AKIN, RESPONDENT, v. WILLIAMS, JUSTICE OF
THE PEACE, APPELLANT.

(No. 3,507.)

(Submitted April 3, 1915. Decided April 27, 1915.)

[148 Pac. 333.]

Justices of the Peace—Unauthorized Continuances—Jurisdiction—Void Judgment.

1. Where a justice of the peace continued a cause upon the oral application of plaintiff made out of court without a showing such as required by section 7036, Revised Codes, and refused to dispose of the cause at the time originally set for hearing, he lost jurisdiction, and a judgment entered by him after hearing testimony in support of the complaint at the time to which the cause had been continued, was void.

[As to remedy for correction of error in justice's court, see note in Ann. Cas. 1913E, 74.]

Appeal from District Court, Blaine County; Frank N. Utter, Judge.

Relator's remedy is not by *certiorari*. *Certiorari* at the relation of J. N. Akin to review a judgment of F. N. Williams, Justice of the Peace of Chinook Township, in an action by the Empire Cattle Company against relator. From a judgment annulling that of the justice of the peace, he appeals. *Affirmed.*

Cause submitted on briefs of Counsel.

Mr. W. B. Sands, for Appellant.

Clark v. Great Northern Ry. Co., 30 Mont. 458, 76 Pac. 1003, and *State v. Laurendeau*, 27 Mont. 522, 71 Pac. 754, are conclusive of this case. It was suggested that the time for appeal had expired, and the case of *Elder v. Justice's Court*, 136 Cal. 364, 68 Pac. 1022, was cited in support of this contention; but the next to the last paragraph of that case shows that the facts were entirely different from this case.

That the relator could not wait until the time had expired to file an appeal and then invoke the remedy of *certiorari* was decided upon the very best of reasons in the case of *Faut v. Mason*, 47 Cal. 7. The relator had a plain, speedy and adequate remedy in the justice court if an error was in fact made, and it is incumbent upon him to show why he did not invoke that remedy. The case of the *State v. Laurendeau*, *supra*, is directly in point, and conclusive of the law of this case. *State v. Justice Court*, 31 Mont. 258, 78 Pac. 498, is identical with this case.

Messrs. O'Keefe & Kuhr, for Respondent.

The authorities have uniformly held that a justice's court exceeds its jurisdiction where there has not been at least a substantial compliance with the law. It has been held that an adjournment before trial day in the absence of the parties without their consent ousts the jurisdiction of the justice. (*State (Dittman etc. Mfg. Co.) v. Leon*, 42 N. J. L. 540; *Brannin v. Voorhees*, 14 N. J. L. 590; *Holz v. Rediske*, 116 Wis. 353, 92 N. W. 1105; *Plano Mfg. Co. v. Stokke*, 9 N. D. 40, 81 N. W. 70; *Roberts v. Hathaway*, 42 Mich. 592, 4 N. W. 307; *Adams & Ford v. Cullen*, 159 Mich. 669, 124 N. W. 549.) But, assuming that the justice acted regularly and lawfully, we contend that defendant did not have sufficient notice of the trial on the adjourned day. The justice must notify the parties in writing of the day fixed for the trial. The giving of such notice is imperative and jurisdictional. (*Jones v. Justice's Court*, 97

Cal. 523, 32 Pac. 575; *Elder v. Justice's Court*, 136 Cal. 364, 68 Pac. 1022.)

In view of our first proposition, it must necessarily follow that there was no appeal. An appeal implies jurisdiction. Where the justice's court has acted without jurisdiction, the district court can acquire none. (Sec. 7122, Rev. Codes; *State v. Justice's Court*, 31 Mont. 258, 78 Pac. 498, 500; *State v. Third Judicial Dist. Court*, 36 Utah, 68, 104 Pac. 750.)

Certiorari has been held to be the proper remedy in cases similar to this one, where the purpose was to set aside a void judgment. (*Harbour v. Eldred*, 107 Mich. 95, 64 N. W. 1054; *Gibson v. Superior Court*, 83 Cal. 643, 24 Pac. 152; *Garnsey v. County Court*, 33 Or. 201, 54 Pac. 539, 1089.) *Certiorari* has been granted where the summons was defective and no jurisdiction had been acquired. (*Wong Kee v. Lillis* (Nev.), 138 Pac. 900.)

MR. JUSTICE SANNER delivered the opinion of the court.

On January 8, 1914, in the justice's court of Chinook Township, before F. N. Williams, justice of the peace, the Empire Cattle Company commenced an action against J. N. Akin, to recover a sum of money alleged to be the unpaid price of a mare sold and delivered. Akin answered and by consent the cause was set down for trial on February 2, 1914, at 10 A. M. On January 31, 1914, one Schuler, manager of the cattle company, orally, out of court and without the presence or assent of Akin, requested the justice to postpone the trial to February 10; on February 2, 1914, Akin appeared, but the cattle company was not present nor represented; whereupon Akin demanded that the cattle company's default for nonappearance be entered and that the cause be dismissed; this was refused with the information that the cause had been continued to February 10, at 10 A. M. On February 10 the cattle company appeared, but Akin was not present nor represented; whereupon, after waiting one hour, the justice heard testimony in support of the complaint, and rendered judgment against Akin in accordance with the prayer thereof. Upon these facts, as

made to appear by return to a writ of *certiorari* issued out of the district court of Blaine county, at the instance of Akin, that court annulled the judgment of the justice, and we are now asked by the present appeal to review the judgment of the district court.

The judgment appealed from was correct. The justice did not [1] continue the cause upon his own motion for any of the reasons recognized by section 7034, Revised Codes; nor by consent of the parties, as may be done under section 7035, but upon application of the plaintiff, without any showing such as required by section 7036. His action was therefore wholly unauthorized, and its effect, coupled with his refusal to dispose of the cause when defendant Akin appeared on February 2, was to lose jurisdiction (*Morrissey v. Blasky*, 22 N. D. 430, 134 N. W. 319). Thereafter the cause was *coram non judice*, the judgment entered was without jurisdictional basis, and was properly annulled by the district court.

The judgment appealed from is affirmed.

Affirmed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Motion for rehearing denied July 7, 1915.

STATE EX REL. PILOT BUTTE MIN. CO., RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 3,660.)

(Submitted April 19, 1915. Decided April 28, 1915.)

[148 Pac. 383.]

Mandamus—Bills of Exceptions—Settlement—Notice.

Bills of Exceptions—Abbreviation—Omission of Essential Facts.

1. While, under section 6788, Revised Codes, all redundant and useless matter should be eliminated from a proposed bill of exceptions, it should not be so far abbreviated as to omit facts without a presentation of which the correctness of the action of the trial court cannot be determined.

[As to duties the performance of which may be compelled by *mandamus*, see note in 125 Am. St. Rep. 492.]

Same—Settlement—*Mandamus*.

2. Where in the preparation of a bill of exceptions in a suit in which an injunction *pendente lite* against a mining company, restraining it from extracting ores from disputed veins, was granted, many matters essentially necessary to a proper determination of the question whether the injunction was properly or improperly granted were omitted, the trial court was justified in refusing to settle it, and *mandamus* did not lie to compel it to do so.

Same—Settlement—Notice.

3. A party is not entitled to have a bill of exceptions settled upon its presentation, without notice to counsel for the opposing party and without an opportunity to the latter to examine the proposed bill or suggest amendments thereto.

Original application by the State at the relation of the Pilot Butte Mining Company for writ of mandate to compel the District Court of Silver Bow County and Jeremiah J. Lynch, a judge thereof, to settle a bill of exceptions. Dismissed.

Mr. John J. McHatton, for Relator, submitted a brief and argued the cause orally.

Mr. W. B. Rodgers, for Respondents, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In October, 1913, the Anaconda Copper Mining Company commenced a suit against the Pilot Butte Mining Company and sought an injunction restraining the defendant from mining upon, or removing ore from, a vein designated in the record as the Emily vein. An order to show cause was issued and a hearing had before the district court of Silver Bow county, Judge Lynch, presiding, in June, 1914. On April 9, 1915, the court entered an order granting an injunction *pendente lite*. From that order the defendant desired to appeal, and to that end presented to the court on the same day a draft of a proposed bill of exceptions, and asked that the same be allowed, settled and signed. The request having been denied, the defendant instituted this proceeding in *mandamus* to compel settlement of the proposed bill. An alternative writ was issued, and upon the return day the district court and judge presented an answer

in which is recited at some length the proceedings had upon the hearing in the district court. The proposed bill of exceptions presented to Judge Lynch recited that the hearing was had upon the pleadings, a stipulation, certain documentary evidence and oral testimony. The pleadings are identified as the complaint, answer and replication. The stipulation was to the effect that the plaintiff owns the Mill View, Badger State and Emily lode claims; the defendant owns the Pilot lode claim, and "that the defendant had been mining from the 2,000 and 1,800 foot levels of the Pilot." The documents offered by plaintiff were the patents to its claims, the record of the patent proceedings, and an apex map and a plan map; those offered by the defendant were the notice of location, the application for patent, and the patent to the Pilot lode claim. The oral testimony is sought to be epitomized in less than two typewritten pages. That offered by the plaintiff is to the effect "that the so-called Emily vein apexed in part in the Emily claim and in part in the Badger State lode claim; that there were two or three separate apexes and veins at the surface in the Emily claim; that the most southerly of said veins passed into the Badger State at a point 574 feet southeasterly from the northwest corner of the Badger State lode claim and 100 feet easterly or southeasterly from the southwest corner of the Emily claim; that this is and was the discovery vein of the Emily claim, and that all of these veins came together on the dip and joined before the 1,000-foot level was reached in the Emily claim, and that downward from said point the vein was one." That offered by the defendant tended "to prove that there was a vein having its apex in the Pilot lode claim, which on its downward course united with the Emily vein above the 1,800 foot Pilot level." The proposed bill recites that defendant objected to the introduction in evidence by the plaintiff of the records of the patent proceedings, except to applications for patent, and reserved an exception to the adverse ruling.

Upon the hearing in this court considerable oral testimony was taken and certain exhibits were introduced. There is not

any substantial conflict in the evidence before us. The effort of [1] counsel for the defendant in the court below to eliminate all useless and immaterial matter meets with our hearty approval. To have incorporated in the bill the 800 pages of testimony taken at the hearing in the trial court, or any considerable portion of it, would have merited the most severe rebuke; for it is apparent that it could not serve any purpose other than to encumber the record and impose needless work upon this court, which could not possibly be productive of any result. Section 6788 imposes a duty upon the judge or referee, in settling a bill of exceptions, to "strike out of it all redundant and useless matter, so that the exceptions may be presented as briefly as [2] possible." In our opinion, however, counsel was overzealous in his attempt at brevity, and his proposed bill is insufficient in several particulars to properly present the exceptions. The records of the land office proceeding, to the introduction of which he excepted; the place where, with reference to the boundaries of the Pilot claim, the work done by the defendant at the 2,000 and 1,800 foot levels was done; where the veins or branches of veins, other than the most southerly one, pass from the Emily claim into the Badger State claim; the course of these veins on their dip into the ground; whether the Emily and Badger State claims have parallel end lines; and whether these veins, or any of them, cut at least one end line of each of these claims,—these omitted facts and records, and possibly others, should have appeared.

We are not passing upon the extent of the extralateral rights to which either the Emily claim or Badger State claim is entitled, or determining whether either of these claims has extralateral rights; but, in our opinion, some of these omitted facts are, and others may become, of the utmost importance in determining whether Judge Lynch's injunction order was broader than it should have been. For instance: If the work by the defendant upon the 2,000 and 1,800 foot Pilot levels was not within territory to which plaintiff laid claim by virtue of its

extralateral rights or otherwise, then no excuse existed for an injunction of any character.

Counsel for defendant was in error in insisting that the bill [3] of exceptions be settled *instantly* upon its presentation, without notice to counsel for plaintiff and without an opportunity for them to examine the proposed bill or suggest amendments to or changes in it. Whatever may be the purpose of section 6787, Revised Codes, we are satisfied it was not intended to cover a case of this character. It presupposes a trial or hearing in progress at the time the bill is presented for settlement, and dispenses with notice to the adversary party upon the theory that such party is present, has an opportunity to examine the proposed bill and aid in making it state the facts truly. In all other cases, including the instant case, the procedure prescribed by section 6788 controls, and notice is essential. Indeed, we think no case can arise where a bill of exceptions can be settled *ex parte*.

For the reasons stated, the court was justified in refusing to settle the proposed bill, and this proceeding is dismissed.

Dismissed.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.



MEMORANDA

OF

DECISIONS RENDERED WITHOUT EXTENDED OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

No. 3,556.—H. J. REED ET AL., APPELLANTS, v. ISABEL DOLENTY ET AL., RESPONDENTS.

Appeal from District Court, Broadwater County.

Decided December 1, 1914.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with motion of respondents asking for dismissal for failure of appellants to file transcript within time required by Rule IV, subdivision 2, of this court.

Motion to reinstate appeal denied January 6, 1915.

Messrs. Galen & Mettler, for Appellants.

Messrs. H. G. & H. S. McIntire, for Respondents.

No. 3,574.—J. C. ALEXANDER, ADME., RESPONDENT, v. GREAT NORTHERN RAILWAY CO., APPELLANT.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

Decided December 2, 1914.

PER CURIAM.—It is ordered that the appeal from the judgment in the above-entitled cause be, and the same is hereby,

dismissed, without prejudice to the said appellant taking or perfecting a new appeal from said judgment.

Messrs. Noffsinger & Walchli and Messrs. Veazey & Veazey,
for Appellant.

No. 3,566.—JUNG SOY, APPELLANT, *v.* RUM YEN,
RESPONDENT.

Appeal from District Court, Silver Bow County; J. J. Lynch,
Judge.

Decided December 8, 1914.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with stipulation of counsel on file herein.

Messrs. Henry C. Smith, Peter Breen and H. K. Jones, for
Appellant.

No. 3,589.—GAVIN W. HAMILTON, PETITIONERS, *v.*
DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of *certiorari* to the District Court of the Fourteenth Judicial District in and for the County of Broadwater, and John A. Mathews, Judge thereof.

Decided December 14, 1914.

PER CURIAM.—It is ordered that the above-entitled proceeding be, and the same is hereby, dismissed in accordance with motion of counsel for petitioners.

Mr. Frank A. Roberts, for Petitioners.

No. 3,127.—ELLEN MACKEL, RESPONDENT, *v.* ALEXANDER MACKEL, APPELLANT.

Appeal from District Court, Silver Bow County; W. R. C. Stewart, Judge of the Ninth Judicial District, presiding.

Decided December 16, 1914.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with *præcipe* of appellant.

Mr. J. E. Healy and Mr. Wm. Meyer, for Appellant.

No. 3,610.—STATE *EX REL.* JAMES L. SPRINKLE, RELATOR, *v.* DISTRICT COURT *ET AL.*, RESPONDENTS.

Original application for writ of mandate to the District Court of the Twelfth Judicial District in and for the County of Blaine and John W. Tattan, a judge thereof.

Decided January 12, 1915.

PER CURIAM.—Relator's petition for a writ of mandate herein is, after due consideration by the court, denied.

Messrs. O'Keefe & Kuhr, for Relator.

No. 3,604.—STATE **EX REL.** F. J. SPAULDING, RELATOR, *v.*
BOARD OF COUNTY COMMISSIONERS OF HILL
COUNTY, MONTANA, and A. M. MORSE, RESPONDENTS.

Original application for writ of mandate.

Decided January 18, 1915.

PER CURIAM.—It appearing that A. M. Morse, one of the respondents herein, is not a necessary or proper party to this proceeding, it is ordered that the proceedings as to him be dismissed. It further appearing from its answer herein that the respondent board of county commissioners has fully complied with the demands of the alternative writ, it is ordered that the proceedings as to the board be also dismissed and that the relator have and recover his costs as against the board. The respondent Morse is entitled to recover his costs of relator.

Messrs. Freeman & Thelen, for Relator.

Mr. Frank W. Turcotte, for Respondents.

No. 3,425.—GAIL V. LYNCH, RESPONDENT, *v.* WYLIE
PERMANENT CAMPING CO., APPELLANT.

Appeal from District Court, Park County; J. M. Clements,
a Judge of the First Judicial District, presiding.

Decided January 18, 1915.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with *praecipe* of counsel for appellant on file herein.

Mr. O. M. Harvey and *Messrs. Wm. Wallace, Jr., John G. Brown* and *T. B. Weir*, for Appellant.

No. 8,121.—EVA JOKI, RESPONDENT, *v.* NORTHWESTERN IMPROVEMENT CO. ET AL., APPELLANTS.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Decided January 20, 1915.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with stipulation of counsel on file herein.

Mr. Jesse B. Roote and Mr. James E. Murray, for Appellant.

Messrs. Maury, Templeman & Davies, for Respondent.

No. 3,619.—STATE EX REL. FRANK HEYFRON, RELATOR, *v.* WILLIAM KEATING, STATE AUDITOR, RESPONDENT.

Original application for writ of mandate.

Decided January 22, 1915.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed, the controversy having been settled.

Messrs. E. C. Day, L. O. Johnson and R. J. Anderson, for Relator.

No. 3,636.—STATE *EX REL.* ROBERT E. O'KEEFE, *RELATOR*,
v. VERNON B. BUTLER, *COUNTY CLERK, RESPONDENT.*

Original application for writ of mandate to respondent as clerk and recorder of Blaine County, Montana.

Decided February 17, 1915.

PER CURIAM.—The relator's petition for a writ of mandate herein is by the court, after due consideration, denied.

Mr. W. H. Kuhr, for Relator.

No. 3,639.—STATE *EX REL.* BERT RILEY *ET AL.*, *RELATORS, v.*
DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control to the District Court of the Second Judicial District in and for the County of Silver Bow.

Decided February 23, 1915.

PER CURIAM.—Relators' application for writ of supervisory control herein, this day presented is by the court, after due consideration, denied.

Mr. Peter Breen, for Relators.

No. 3,637.—C. L. HALVERSON, RESPONDENT, *v.* CHAS. GREENWOOD ET AL., APPELLANTS.

Appeal from District Court of Chouteau County.

Decided March 9, 1915.

PER CURIAM.—Respondent's motion to dismiss the appeal herein for laches is, after due consideration by the court, granted and the appeal is dismissed accordingly.

Mr. E. D. Harnden, for Respondent.

No. 3,618.—STATE *EX REL.* JOSEPH J. CARROLL, GUARDIAN, RELATOR, *v.* DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of *certiorari* to the District Court of Lewis and Clark County, and J. M. Clements, a Judge thereof.

Decided February 4, 1915.

PER CURIAM.—This matter coming on regularly for final determination upon the evidence adduced at the hearing heretofore had in the matter of contempt, the court finds Anna E. Nett guilty of disobedience of the stay order issued herein, and imposes a fine of \$25.00, she to stand committed to the county jail of Lewis and Clark county until said fine be paid. In the matter of the writ of *certiorari* issued herein, it is ordered that the writ be set aside and the proceedings dismissed.

Messrs. Galen & Mettler, for Relator.

Mr. Wellington D. Rankin, for Respondents.

No. 3,487.—M. J. HOLDEN ET AL., APPELLANTS, v. KALISPELL ATHLETIC ASSOCIATION, RESPONDENT.

Appeal from District Court, Flathead County; J. E. Erickson, Judge.

Decided February 8, 1915.

PER CURIAM.—It is hereby ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with stipulation of counsel.

Mr. P. H. McDonald and Messrs. Noffsinger & Walchi, for Appellants.

Messrs. Logan & Child, for Respondent.

No. 3,649.—MONTANA INDEPENDENT TELEPHONE CO., APPELLANT, v. CITY OF BUTTE, RESPONDENT.

Appeal from District Court, Silver Bow County.

Decided March 25, 1915.

PER CURIAM.—It is ordered that the appeal in the above-entitled action be, and the same is hereby dismissed in accordance with stipulation of counsel on file herein.

Mr. John F. Davies and Mr. T. J. Davis, for Appellant.

Messrs. Alex. Mackel, W. F. Davis and N. A. Rotering, for Respondent.

No. 3,630.—STATE EX REL. THE SECURITY BANK OF
HAVRE, RESPONDENT, v. ROY S. FULLER, COUNTY
TREASURER, APPELLANT.

*Appeal from District Court, Hill County; J. A. Matthews,
Judge of the Fourteenth Judicial District, presiding.*

Decided April 12, 1915.

PER CURIAM.—It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with the motion of respondent on file herein, at the cost of appellant.

Mr. D. M. Kelly, Attorney General, for Appellant.

Messrs. Norris & Hurd, for Respondent.

INDEX—VOL. 50.

ADMISSIONS.

See, also, Evidence, 17.

Pleading contributory negligence,—see Pleading and Practice, 12.

ADVERSE POSSESSION.

How Title may be Acquired.

1. Title to land may be acquired, as against one having the record title, by holding adverse possession thereof for the period of the statute of limitations, even though the claim was initiated by a naked trespass. *Morrison v. Linn*, 396.

Payment of Taxes.

2. Payment of taxes is not an element of adverse possession, unless made so by statutory requirement.—*Morrison v. Linn*, 396.

Holding Under "Color of Title"—Definition.

3. One holding land under a written instrument, a statute, or a judgment or decree of court, which appears to convey to or confirm title in him, but does not do so in fact, holds under "color of title."—*Morrison v. Linn*, 396.

Holding Under "Claim of Title"—Definition.

4. Adverse possession of land under "claim of title" held to mean the claim asserted by the disseisor of his intention to appropriate and use the land as his own, to the exclusion of the rights of all persons, irrespective of any color, right or title as the foundation of his claim.—*Morrison v. Linn*, 396.

Extent of Right Acquired—Constructive Possession.

5. A claimant of land by adverse possession under color of title for the statutory period obtains title to the entire tract described in his muniment; but one relying upon claim of title secures only so much of the land as he actually possesses, there being no constructive possession under mere claim of title.—*Morrison v. Linn*, 396.

AFFIDAVITS.

Evidence consisting wholly of—How reviewed on appeal,—see Appeal and Error, 13.

AMENDMENTS.

See Pleading and Practice, 5.

ANIMALS.

See, also, Livestock.

Running at Large—Pleading and Proof.

1. In an action for damages claimed to have been caused by defendant's neglect of duty imposed by sections 1881 and 1883, Revised Codes, not to permit rams to run at large at certain seasons of the year, plaintiff must plead nonobservance of the statute and make a case bringing the defendant within the liability created thereby. *Ball Ranch Co. v. Hendrickson*, 220.

Same—Simple and Statutory Negligence—Liability.

2. Where simple negligence is relied on as a basis of recovery of damages caused by permitting animals of the character referred to above to run at large, the plaintiff must prove, by a preponderance of the evidence, the negligence alleged, the defendant being held to the exercise of ordinary care only; where, however, the damages are alleged to spring from noncompliance with the duty imposed by section 1881, Revised Codes, disobedience in this respect constitutes negligence *per se* and makes defendant liable, if the injury was proximately caused thereby.—*Ball Ranch Co. v. Hendrickson*, 220.

Same.

3. *Held*, that where rams run at large without the tacit consent of the persons in control, or such persons make a reasonable effort to hinder or prevent them from running at large, no offense is committed, and no liability is incurred either under sections 1881–1883, Revised Codes, or in an action based upon simple negligence.—*Ball Ranch Co. v. Hendrickson*, 220.

Same—Negligence—Jury Question.

4. Evidence reviewed and *held* to be insufficient to warrant the trial court in determining as a matter of law, and peremptorily instructing the jury, that defendants were guilty of negligence in permitting rams to stray away.—*Ball Ranch Co. v. Hendrickson*, 220.

Same—Measure of Damages.

5. In an action for negligence, in permitting rams to stray away and to get into plaintiff's band of ewes, causing them to become pregnant and to lamb at a time of the year when it was impossible to keep either the ewes or the lambs, the measure of damages was the market value of the ewes at the time of the wrong, with interest from that time in the discretion of the jury; hence evidence of the value of the lambs which died was inadmissible.—*Ball Ranch Co. v. Hendrickson*, 220.

APPEAL AND ERROR.

Complaint—Sufficiency—Review.

1. As against the general objection, made for the first time on appeal, that the complaint in an action for damages to agricultural land because of the negligent construction, maintenance and operation of an irrigating canal, did not state a cause of action, the pleading *held* sufficiently specific to support a judgment for plaintiff.—*Eder v. Crown Butte etc. Co.*, 106.

Conflict in Evidence—Verdict—Conclusiveness.

2. Where the evidence on every issue involved was conflicting, the verdict of the jury, approved by the lower court by its action in denying a retrial, will not be disturbed on appeal under an assignment that the evidence was insufficient to support it.—*Eder v. Crown Butte etc. Co.*, 106.

New Trial Order—Affirmance, When.

3. An order, general in terms, granting a motion for a new trial, the notice of intention to move for which specified all the statutory grounds, will not be disturbed on appeal where the record shows a sharp conflict in the evidence on the issue tried.—*Fadden v. Butte Miners' Union No. 1*, 104.

Nonsuit—Evidence of Plaintiff—How Viewed.

4. On appeal from a judgment rendered on a nonsuit, the evidence will be considered in the view most favorable to plaintiff, and every fact which the evidence tends to prove, treated as proved.—*McLaughlin v. Barndsen*, 177.

Appeal—Presumptions—Burden of Showing Error.

5. On appeal from an order granting a new trial the appellant has the burden of overcoming the presumption that the ruling appealed from is correct; hence where no error is assigned nor any attempt made to show the impropriety of the order, its affirmance follows. *Wherry v. Sprinkle*, 191.

Default Judgment—Record.

6. On appeal from an order vacating a default judgment, the judgment-roll is no part of the record; the papers used on the hearing resulting in such order, constitute the record and must be authenticated by their incorporation in a bill of exceptions duly settled by the presiding judge.—*Beller v. Le Boeuf*, 192.

Same—Record—Sufficiency.

7. On appeal from an order vacating a default judgment, a transcript certified by the clerk as a true copy of plaintiff's bill of exceptions, purporting to be a narrative of the proceedings had and done in respect to the motion to vacate and to contain all the papers relative thereto, and settled and certified by the judge as a true and correct record of the proceedings, sufficiently complied with section 7113, Rev. Codes, relative to what the record on appeal in such cases shall contain. *Beller v. Le Boeuf*, 192.

Conflict in Evidence—Verdict Conclusive.

8. A judgment will not be reversed for alleged insufficiency of the evidence where the record shows a substantial conflict therein.—*Rood v. Murray*, 240.

Dismissal of Cause, When.

9. Where plaintiff has had a fair opportunity to prove his cause of action and on appeal it appears that he obviously presented all he had to offer in that behalf, and failed, the cause will be ordered dismissed. *Rood v. Murray*, 240.

Receivers—Nonappealable Orders.

10. An order annulling an order appointing a receiver is not appealable, but may be reviewed on appeal from the final judgment.—*Taintor v. St. John*, 358.

Record on Appeal—Technicalities.

11. The inadvertent use of the term "bill of exceptions" for "statement of the case" by the trial court and counsel for appellant in designating the record was not sufficient reason to deny a hearing on the merits and dismiss the appeal.—*Doornbos v. Thomas*, 370.

Same—Judgment-roll—Authentication—Sufficiency.

12. Where the record on appeal contains properly authenticated copies of the papers of which the judgment-roll is composed, it is sufficient to meet the requirements of section 6799, Revised Codes, even though it is not authenticated by the clerk as the judgment-roll.—*Doornbos v. Thomas*, 370.

Appeal—Evidence—Affidavits—How Viewed.

13. Where an application for a larger allowance to a divorced wife for the support of her children, was tried in the district court wholly upon evidence in the form of affidavits, the supreme court, on appeal, will treat the application as if originally made to and tried by it, and determine the value of the evidence accordingly.—*Brice v. Brice*, 388.

Mandamus—Dismissal—Moot Case.

14. Where, after the institution of a *mandamus* proceeding in the supreme court, the Act under which it was sought to compel a board of county commissioners to do certain things toward the creation of a new county, was repealed, the proceeding ordered dismissed.—*State ex rel. Darling v. Board*, 434.

Theory or Case.

15. Where a party permits, without objection, the trial of a cause to proceed upon a certain theory, he may not, on appeal, assert that a different theory should have been adopted.—*Waite v. Shoemaker & Co.*, 264; *Columbus State Bank v. Erb*, 442.

Appeal from Original Judgment—Modified Judgment.

16. Where the district court on motion for new trial modified the judgment in a personal injury action, by scaling the verdict, with the consent of plaintiff, the judgment as modified superseded the original one, and an appeal from the latter did not lie.—*Chenoweth v. Great Northern Ry. Co.*, 481.

Evidence Without Conflict—How Viewed on Appeal.

17. Where the evidence presents no substantial conflict, questions of fact are eliminated and the remaining questions of law may be determined as upon an agreed statement of facts.—*Milwaukee Land Co. v. Ruesink*, 489.

Defective Findings—Noneonflicting Evidence—Review.

18. Where, in a case presenting no conflict in the evidence the court makes findings, defects in them, though excepted to, do not call for a reversal of the judgment, but will be ignored and the conclusion of the trial court reviewed upon an examination of the whole of the evidence in the record.—*Milwaukee Land Co. v. Ruesink*, 489.

New Trial—Insufficiency of Evidence—Affirmance of Order—When.

19. Where, in an action for malpractice, the evidence preponderated decisively against the finding of the jury in favor of plaintiff, it was the duty of a district judge, called in to preside at the hearing of a motion for a new trial, to grant the same.—*Steiman v. The Murray Hospital*, 555.

ASSIGNMENT.

See *Contracts*, 19.

ATTORNEYS.

See, also, *Contempt*, 1-4.

Conviction of Felony—Disbarment—Procedure.

1. Upon lodgment with the clerk of the supreme court of a certified copy of the record of an attorney's conviction for a felony, that court, under section 6410, Revised Codes, if it appear of record that the judgment of conviction is final either by reason of his acquiescence in it or made so by affirmance on appeal, must, without notice or citation, enter judgment that his name be stricken from the roll of attorneys.—*In re Sutton*, 88.

Forgery—Moral Turpitude.

2. The crime of forgery involves moral turpitude, within the meaning of subdivision 1, section 6393, Revised Codes, providing for the disbarment of attorneys on conviction "of a felony or misdemeanor involving moral turpitude."—*In re Sutton*, 88.

Pardon—Effect.

3. By applying for and obtaining a pardon, an attorney convicted of crime will be held to have acquiesced in the judgment of conviction.—*In re Sutton*, 88.

Practicing Law—What Constitutes.

4. A person who makes it his business to act, and who does act, for, and by the warrant of, others in legal formalities, negotiations or proceedings, practices law.—*In re Bailey*, 365.

Practicing in Court of Record—What Constitutes.

5. One who advises clients touching legal matters pending or to be brought before a court of record, or prepares pleadings or proceedings for use in a court of record, or appears before a court of record, either directly or by a partner or proxy, practices law in a court of record.—In re Bailey, 365.

Practicing Without License—Contempt.

6. One who does the things referred to in paragraphs 4 and 5, *supra*, without having been duly licensed by the supreme court to act as an attorney and counselor at law, is guilty of a contempt of said court. In re Bailey, 365.

Practicing Law—Not Inherent Right.

7. The practice of law is not an inherent right, but a privilege, subject to state control.—In re Bailey, 365.

BANKS AND BANKING.**Receivers—Setoff.**

1. A receiver of an insolvent commercial bank occupies no higher position relative to the rights of those indebted to it than the bank did before his appointment. He acts as assignee of the insolvent, and as such must, in the collection of its assets, recognize the right of setoff where it exists just as the bank would have been compelled to do had it sought to enforce collection prior to insolvency.—Williams v. Johnson, 7.

Depositors—Debtors—Setoff.

2. In an action by the receiver of an insolvent commercial bank against a depositor to recover on a promissory note, *held* that the latter was entitled to a setoff, by way of counterclaim, to the amount of his deposit at the time the bank suspended, and that such setoff did not give defendant an unlawful preference over the other creditors of the bank. Williams v. Johnson, 7.

Savings and Commercial Banks.

3. A bank organized under sections 3923-3944, Revised Codes, with a capital stock, and the profits of which are to be divided among the stockholders is a commercial and not a savings bank, and the fact that it bears the name of "Savings Bank" does not require it to be classed under the head of that class of banks, within the meaning of the statute (Rev. Codes, secs. 3945-3958), providing for their organization and regulation.—Williams v. Johnson, 7.

Insolvency—Deposits—Setoff—Interest.

4. Since the effect of the suspension and declared insolvency of a bank is to make deposits due and actionable, defendant was entitled to interest on his deposit from the date the receiver took possession (the day of suspension) until the date of the judgment.—Williams v. Johnson, 7.

Receivership—Parties—District Judges—Right to Disqualify.

5. By the appointment of a receiver in aid of a suit by the state against a bank to have it declared insolvent and its business wound up, the corporation was not deprived of its right, as a party to the suit, to disqualify the judge before whom it was pending for imputed bias and prejudice, under amended section 6315, Revised Codes (Laws 1909, p. 161).—State ex rel. First T. & S. Bank v. District Court, 259.

BILLS OF EXCEPTIONS.**Abbreviation—Omission of Essential Facts.**

1. While, under section 6788, Revised Codes, all redundant and useless matter should be eliminated from a proposed bill of exceptions, it

should not be so far abbreviated as to omit facts without a presentation of which the correctness of the action of the trial court cannot be determined.—*State ex rel. Pilot Butte Min. Co. v. District Court*, 585.

Settlement—*Mandamus*.

2. Where in the preparation of a bill of exceptions in a suit in which an injunction *pendente lite* against a mining company, restraining it from extracting ores from disputed veins, was granted, many matters essentially necessary to a proper determination of the question whether the injunction was properly or improperly granted were omitted, the trial court was justified in refusing to settle it, and *mandamus* did not lie to compel it to do so.—*State ex rel. Pilot Butte Min. Co. v. District Court*, 585.

Same—Notice.

3. A party is not entitled to have a bill of exceptions settled upon its presentation, without notice to counsel for the opposing party and without an opportunity to the latter to examine the proposed bill or suggest amendments thereto.—*State ex rel. Pilot Butte Min. Co. v. District Court*, 585.

BONDS.

Official,—see Sureties.

BURDEN OF PROOF.

Common Carriers—Delay.

1. Where a common carrier relies upon a special contract to escape liability for a breach of its common-law duty, it must plead and bear the burden of establishing it.—*Wall v. Northern Pacific Ry. Co.*, 122.

Same—Cause of Delay.

2. Since the movements of defendant's train carrying the plaintiff's cattle were exclusively under its own management and control, and the facts which caused the train to be delayed were peculiarly within the knowledge of its officers and agents, the burden was upon it to show that the delay complained of arose from some other cause than its own negligence.—*Wall v. Northern Pacific Ry. Co.*, 122.

Same.

3. Upon showing that defendant carrier consumed substantially thirteen days in delivering his cattle at the place of destination over a route usually covered in six or seven days, plaintiff had made a *prima facie* case of negligence on the part of defendant, and was not bound to show that every delay along the route was caused by the negligence of defendant.—*Wall v. Northern Pacific Ry. Co.*, 122.

Wills—Probate—Contest.

4. Upon the trial of the issues tendered by the contestant of a will on probate thereof and joined by the answer of the proponent, the burden of proof rests upon the former.—*In re Williams' Estate*, 142.

Sales—Warranty.

5. Where breach of warranty of a piece of machinery for a certain purpose is relied upon, in an action to recover its purchase price, the burden of showing unfitness resting upon defendant is not sustained by evidence that upon a test it did poor work, unless it is also shown that the adjustment and operation were correct at the time of the test.—*Jones v. Armstrong*, 168.

Personal Injuries—Contributory Negligence.

6. The burden of proving that a servant's negligence contributed to his injury is upon the master.—*Comerford v. James Kennedy Construction Co.*, 196.

Divorce—Modification of Decree.

7. Where a divorced wife makes application for an increased allowance for her own support, or that of her children whose custody was decreed to her, it must appear that her or their needs are such as to render a larger allowance necessary and that the husband, by reason of a change in his circumstances, is able to pay the additional amount, the burden of proof being upon the applicant.—*Brice v. Brice*, 388.

Negligence.

8. An inference of negligence may not be drawn from the bare occurrence of an injury in any case; hence the contention, in an action against a railway company for damages incident to the giving way of an embankment alleged to have been negligently constructed, that the mere washing away of the embankment made out a *prima facie* case of negligence against defendant, and that the burden then shifted to it, was without merit.—*Lyon v. Chicago, Milwaukee & St. P. Ry. Co.*, 532.

CANCELLATION OF INSTRUMENTS.

See, also, Real Property, 3-12.

Complaint—Mutual Mistake—Sufficiency.

1. In a suit for the reformation of one and the cancellation of another instrument because executed under the influence of mutual mistake of the parties, the complaint contained a paragraph setting forth that plaintiff did not know whether defendants were honestly mistaken, that she was led by their conduct to believe, and did believe, that they were mistaken, but that, if they learned otherwise, they concealed the knowledge and information from her, *etc.* *Held*, that the latter averment did not render the pleading of mutual mistake ineffective.—*Brundy v. Canby*, 454.

Mistake of Law—Equity.

2. The rule that a court of equity will grant relief asked for on the ground of a mutual mistake when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other, has especial application to a case involving a mutual mistake of law, accurate legal knowledge not being imputable to all the world.—*Brundy v. Canby*, 454.

Mutual Mistake—Evidence—Sufficiency.

3. Evidence *held* sufficient to warrant a finding of mutual mistake in the execution of the instruments in controversy.—*Brundy v. Canby*, 454.

Placing Party in *Statu Quo*—Complaint.

4. Where plaintiff in her complaint in a suit seeking cancellation stated that she received nothing of value from the defendants, an allegation offering to place them in *statu quo* was unnecessary.—*Brundy v. Canby*, 454.

When Restoration not Required.

5. Persons who were mistakenly deemed by plaintiff to have an interest in the property of her deceased husband as heirs and as such joined in a contract of sale thereof, gave nothing of value which it was her duty to restore, and assumed no liabilities as grantors or guarantors, and hence their situation was not so changed by the transaction as to render a decree in favor of plaintiff inequitable without requiring them to be placed in *statu quo*.—*Brundy v. Canby*, 454.

Restoration Unnecessary, When.

6. Plaintiff in a suit for the cancellation of an instrument reciting a consideration of one dollar was not required to allege and prove an offer to return such consideration, where the decree in plaintiff's favor

rightfully required the defendant to account to the former for a large sum of money.—Brundy v. Canby, 454.

Restoration of Nominal Consideration—"De Minimis" Doctrine.

7. Under the doctrine of *de minimis non curat lex*, a court of equity would not be justified in denying cancellation of an instrument involving valuable property rights, merely because the return of the nominal consideration of one dollar was not formally offered.—Brundy v. Canby, 454.

Estoppel—Retention of Benefits.

8. Plaintiff, who was the sole heir of her deceased husband but mistakenly believed others to be heirs, and under such belief, jointly with them, executed an instrument of sale whereby only one-half of the purchase price was to be paid to her, whereas she was entitled to the whole thereof, was not estopped to seek cancellation of the instrument by reason of her receipt and retention of her proportion of the first installment of the purchase price.—Brundy v. Canby, 454.

Estoppel by Ratification—What Does not Constitute.

9. An act done in ignorance of one's rights or under the influence of the mistake which induced the contract sought to be canceled, does not constitute an estoppel by ratification.—Brundy v. Canby, 454.

Fraud—Mistake—Findings.

10. Where the court found that a contract had been entered into by the mutual mistake of the parties, a requested finding that fraud had not been practiced upon plaintiff was properly refused.—Brundy v. Canby, 454.

CARRIERS.

See Railroads.

CERTIORARI.

See, also, Judgments, 7; District Courts, 8.

County Commissioners—Filling Vacancy in Board—Ministerial Duty.

1. The power to fill a vacancy in the office of county commissioner residing in the district judge of the district in which the vacancy occurs is ministerial, not judicial, in character; therefore, *certiorari*, which may issue only to review acts done by an inferior tribunal, board or officer in the exercise of judicial functions does not lie to annul an order filling a vacancy deemed by the judge to exist in that office in a newly created county because of the alleged unconstitutionality of the Act under which the office was filled by election, and because the incumbent was holding two other offices regarded by him as incompatible. State ex rel. Downen v. District Court, 249.

Affidavit not a Pleading.

2. The only purpose of relator's affidavit in *certiorari* is to move the reviewing court to act; upon the issuance of the writ it becomes *functus officio*; it is not a pleading and not traversable.—State ex rel. First T. & S. Bank v. District Court, 259.

Return—What Does not Constitute.

3. The return in *certiorari* running to a court must be made by its clerk (Rev. Codes, sec. 7205); hence an answer to the averments of relator's affidavit, filed by the judge of the court as his "return," was not such and had no place in the proceedings.—State ex rel. First T. & S. Bank v. District Court, 259.

CHALLENGES.

Peremptory,—see Jury, 4-6.

CHATTEL MORTGAGES.

With power of sale,—see Mortgages, 1.

CHECKS.

See Evidence, 7-9.

CHILDREN.

See Infants.

CITIES AND TOWNS.

Offices—When Incompatible.

1. Offices are incompatible when the incumbent of one has power of removal over the other, or when one has power of supervision over the other, or when the nature and duties of the two render it improper, from consideration of public policy, for one person to retain both.—State ex rel. Klick v. Wittmer, 22.

Alderman—City Purchasing Agent—Incompatible Offices.

2. *Held*, under the above rule, that the office of alderman and that of purchasing agent of a city were incompatible and that therefore one individual could not fill both at the same time.—State ex rel. Klick v. Wittmer, 22.

City Council—Vacancy—Majority Vote—What Constitutes.

3. Where one member of a city council, consisting of ten aldermen, impliedly resigned his position by accepting an incompatible city office, a vacancy occurred which was properly filled by a majority vote of five of the council as then constituted.—State ex rel. Klick v. Wittmer, 22.

Special Street Improvements—Procedure—Statutes—Void Assessment.

4. To the lawful opening and widening of a street and the acquisition of property necessary therefor at the expense of abutting owners, compliance with the procedure requirements of sections 3369 and 3370, Article X of Part IV, Title III, Chapter III, Revised Codes, relating to special improvements, is necessary; an ordinance passed without regard to their provisions was therefore ineffective to authorize a special assessment to defray the cost of such an improvement.—Kohn v. City of Missoula, 75.

Statutes—Excavations.

5. *Held*, that section 8535, Revised Codes, making it obligatory on persons sinking shafts or running drifts or cuts within the corporate limits of a city, etc., to properly guard the same under a heavy penalty for failure to do so, has no application to a ditch or trench temporarily opened for the purpose of laying sewer-pipe.—McLaughlin v. Bardsen, 177.

Ordinances—"Excavations"—Definition.

6. An ordinance making it unlawful to permit any "shaft, drift or prospect hole or other excavation" to remain unguarded within the limits of a city where mining is the principal industry, *held* not to be susceptible of application to a trench dug for sewer-pipe purpose, the words "or other excavation," under the rule of *ejusdem generis* or *noscitur a sociis*, being referable to an excavation made in the course of prospecting or active mining.—McLaughlin v. Bardsen, 177.

Telegraphs and Telephones—Placing Wires Underground—Constitution.

7. *Held*, that a city ordinance requiring wires used for the transmission of electricity for telegraph and telephone purposes, among others, to be placed underground in the contested business district, and

providing punishment for disobedience, was a valid exercise of the police power, and that the contention that section 14, Article XV, of the state Constitution, lodged the authority to regulate the telegraph and telephone business exclusively in the legislature, had no merit.—*City of Butte v. Montana Ind. Tel. Co.*, 574.

Same—Regulation—Powers.

8. By subdivisions 8 and 43, section 3259, Revised Codes, cities and towns are given the power to regulate the use of streets by the erection of telegraph or telephone poles, the stringing of wires thereon, etc. By section 4400 certain rights of telephone, telegraph and other companies are defined, the section concluding: "Nothing herein shall be so construed as to restrict the powers of city or town councils." *Held*, that by this latter provision the legislature meant to preserve to cities and towns the police powers granted in the subdivisions above. *City of Butte v. Montana Ind. Tel. Co.*, 574.

COLLATERABLE SECURITY.

See Negotiable Instruments.

CONSTITUTION OF MONTANA.

(List of Sections Cited or Commented upon.)

Article	III, Section 8	33
Article	III, Section 18	35
Article	III, Section 29	340, 578
Article	IV, Section 1	140
Article	V, Section 9	138, 142
Article	VII, Section 7	336
Article	VII, Section 9	93
Article	VIII, Section 11	140, 301
Article	VIII, Section 12	337, 339
Article	VIII, Section 15	362
Article	VIII, Section 34	338 <i>et seq.</i>
Article	XII, Section 2	163, 258
Article	XIII, Section 5	317, 321
Article	XV, Section 14	577
Article	XVI, Section 4	251
Article	XVII, Section 1	405

CONSTITUTIONAL LAW.

Election contests of members of the legislative assembly,—see Elections, 1-4
Constitutional limit of county expenditures,—see Taxation, 6-10.

Constitution—Nature of Instrument.

1. Speaking generally, the state Constitution is a limitation upon, not a grant of legislative powers.—*State ex rel. Smith v. District Court*, 134; *City of Butte v. Montana Independent Telephone Co.*, 574.

Mines and Mining Claims—Taxation—Surface Ground.

2. Under section 2, Article XII of the Constitution, and section 2500, Revised Codes, before the land embraced in a mining claim becomes subject to taxation at a valuation greater than the price paid the government therefor, the taxing officers must ascertain, and they have the burden of showing when their authority is questioned, that the surface ground, or some portion thereof, is used for other than mining purposes and has an independent value for such purpose.—*Barnard Realty Co. v. City of Butte*, 159.

"Due Process of Law."

3. By "due process of law" is not necessarily meant judicial process.—*State ex rel. Marshall v. District Court*, 289.

Office—Length of Term—Power of Legislature.

4. An Act authorizing an appointment for a term longer than that contemplated by the Constitution is ineffective.—*State ex rel. Patterson v. Lentz*, 322.

CONTEMPT.

Punishment—Procedure.

1. While the right to punish for a direct contempt is inherent in courts, the procedure provided is purely statutory, and the law must be followed.—*In re Mettler*, 299.

Habeas Corpus—Pleadings—Presumptions.

2. Though one under punishment for a direct contempt cannot, on *habeas corpus*, deny the facts stated in the order adjudging him guilty, no presumptions or intendments are to be indulged against him.—*In re Mettler*, 299.

Insufficiency of Order.

3. *Held*, that an order of the district court adjudging an attorney guilty of contempt committed in its immediate presence, which recited that the contemnor "by his conduct, words and manner disturbed the orderly proceedings of this court, and by his insolent demeanor, angry words, is in contempt" *etc.*, consisted of mere conclusions and was fatally defective because not in compliance with the provision of section 7311, Revised Codes, that such an order must recite the facts as occurring at the time of the alleged contempt.—*In re Mettler*, 299.

Nature of Proceedings—Order must be Certified.

4. Proceedings in contempt are in their nature criminal; hence the order adjudging one guilty and committing him to the custody of the sheriff until the fine imposed shall be paid must, under section 9377, Revised Codes, be certified; in the absence of such certification, such order was not any warrant for the detention of the complainant.—*In re Mettler*, 299.

Practicing Without License.

5. One who practices law without having been duly licensed by the supreme court to act as an attorney and counselor at law, is guilty of a contempt of said court.—*In re Bailey*, 365.

CONTINUANCES.

Filing disqualifying affidavit under fair trial law,—see *District Courts*, 14.

Effect of unauthorized continuance,—see *Justices of the Peace*, 1.

CONTRACTS.

See, also, *Options; Real Property*.

Of carriage of livestock,—see *Railroads*, 1-6.

Written Contracts—Change in—Parol Testimony—Inadmissibility.

1. Under section 5067, Revised Codes, an agreement resting in parol and not fully executed could not alter a prior written contract, and was therefor properly excluded from evidence.—*Kinsman v. Stanhope*, 41.

Nominal Damages—New Trial.

2. In an action against a builder for breach of a contract calling for the delivery of a certain number of brick at a given time, evidence in support of a counterclaim for damages because of plaintiff's omission to deliver a sufficient number to keep the work going, *held*, to justify recovery of no more than a nominal sum, failure to award which did not warrant the granting of a new trial, under the rule above.—*Busbee v. Gagnon Co.*, 203.

Mitigation of Damages—Duty of Plaintiff.

3. One claiming to have been damaged by breach of a contract is bound to take measures, if reasonably possible, to mitigate the resulting injury.—*Busbee v. Gagnon Co.*, 203.

Counterclaims—Splitting Causes of Action—Effect.

4. Where defendant, instead of including in one counterclaim damages which were one of the natural consequences of delay resulting from plaintiff's failure to deliver brick as required, split his cause of action into two counterclaims and recovered on the first, he was not entitled to even nominal damages on the second.—*Busbee v. Gagnon Co.*, 203.

Sales—Personal Property—Warranty—Remedies.

5. One who purchases articles for a particular purpose need not rescind the contract and restore them to the seller upon discovering a breach of the implied warranty (Rev. Codes, sec. 5110), but may set up his claim for damages by way of counterclaim in an action by the plaintiff for the purchase price.—*Busbee v. Gagnon Co.*, 203.

Same—Witnesses—Credibility.

6. Where defendant contractor promptly paid for all brick delivered and used them in the construction of a building, without complaint that they were not of suitable quality, the court did not abuse its discretion in disregarding his testimony in support of his counterclaim based on alleged unfitness for use in the walls of a building.—*Busbee v. Gagnon Co.*, 203.

Public Officers—Personal Liability—Evidence—Insufficiency.

7. Evidence in an action in which defendant was sought to be held personally liable on a contract of employment alleged to have been made with the plaintiff while the former was superintendent of construction of public buildings for the state, held insufficient to support a verdict for plaintiff.—*Rood v. Murray*, 240.

Same—Personal Liability.

8. The rule that one dealing with the agent of a known principal in a matter within the scope of the agency cannot hold the agent, in the absence of satisfactory proof of the latter's intention to substitute his personal liability for that of the principal, is especially applicable to the case of an officer entering into a non-negotiable agreement for the performance of a public duty, it being presumed that he did not undertake personally to assume the public burdens.—*Rood v. Murray*, 240.

Pleading—Entirety of Contract—Estoppel.

9. Plaintiff having pleaded the contract of employment as an entirety could not thereafter assert that part of it was with the state at a certain wage per day, and the other part with defendant personally on a commission basis.—*Rood v. Murray*, 240.

Quantum Meruit—Inconsistent Pleadings—Effect.

10. Where, in an action to recover for services rendered, plaintiff in one count of his complaint declared upon a contract in writing and in another upon a *quantum meruit*, and in his reply sought to avoid the writing on the ground of fraud, he must be held to have abandoned the cause of action upon the contract, inasmuch as by the alleged misrepresentation a meeting of minds, or the formation of a contract, was prevented.—*Waite v. Shoemaker & Co.*, 264.

Breach—Partial Recovery—Remedies.

11. A party who stops short of full performance of an entire contract cannot sue upon a *quantum meruit* for any part of the work done; after full performance, however, he may sue upon the contract and state his cause of action in different counts to meet the exigencies

of the case, or upon a *quantum meruit* alone.—*Waite v. Shoemaker & Co.*, 264.

Part Performance—Recovery on *Quantum Meruit*, When.

12. Where departures from the stipulations of a contract are not substantial or intentional, and do not affect the entire result, the party at fault may recover on a *quantum meruit*, defendant being recompensed for all damages sustained by him because of plaintiff's delinquency.—*Waite v. Shoemaker & Co.*, 264.

Fraud—Election of Remedies—Estoppel.

13. A party who has been induced to enter into a contract by false representations and, upon making an effort to perform it, discovers that, by reason of conditions actually existing, substantial performance is not possible, may repudiate it and recover for the value of services actually rendered; if he does not elect to repudiate it but does elect to abide by its terms, he is estopped thereafter to allege misrepresentations as a ground for avoiding his obligations under them, and may recover thereafter on a *quantum meruit* only upon a showing of substantial performance under the rule declared in paragraph 12, *supra*.—*Waite v. Shoemaker & Co.*, 264.

Continued Performance—Ratification.

14. Where performance in part has been accomplished before discovery of the fraud which induced plaintiff to enter into a contract, and repudiation of it is impracticable, a continuance of performance will not be held a ratification precluding relief independently of the contract.—*Waite v. Shoemaker & Co.*, 264.

Partial Performance—*Quantum Meruit*—Evidence Insufficiency.

15. Evidence in an action to recover the value of services rendered under a contract to plow and sow certain lands, held not to show a substantial performance of the contract or that plaintiff's omissions and departures from its terms were unintentional or so inconsequential as not to affect the entire result; hence he was not entitled to recover under the rule announced in paragraph 12, *supra*.—*Waite v. Shoemaker & Co.*, 264.

Substantial Performance—Jury Question.

16. Whether or not a contract has been substantially performed is usually a question for the jury to determine.—*Waite v. Shoemaker & Co.*, 264.

Difficulty in Performance—Effect.

17. Difficulty encountered by the obligor whereby the performance of a contract cannot be accomplished without greater expense than contemplated by him, is not alone sufficient to justify him in abandoning his obligation or stopping short of a full and substantial discharge thereof.—*Waite v. Shoemaker & Co.*, 264.

Performance to Satisfaction of Obligees—Meaning of Clause.

18. Under a clause of a contract providing that the work called for shall be done to the satisfaction of the obligee, payment may not be capriciously refused on the ground that it is unsatisfactory, the requirement being met if the work be done in such a way as to be satisfactory to a reasonable person acting in good faith.—*Waite v. Shoemaker & Co.*, 264.

Assignment.

19. Assignability of contracts being the rule and nonassignability the exception, in the absence of a stipulation to the contrary in an oral agreement to sell land, the right conferred by it was assignable.—*Milwaukee Land Co. v. Ruesink*, 489.

Writings to be Construed Together.

20. An order for the payment of money and acceptance thereof executed contemporaneously and relating to the same transaction must be construed together.—*Averill Machinery Co. v. Bain*, 512.

CONTRIBUTORY NEGLIGENCE.

See Personal Injuries.

CONVERSION.

Showing Necessary to Recover.

1. In an action for damages for conversion, plaintiff must recover upon the strength of his own title, and not upon the weakness of that of his adversary, and must show a general or special ownership in and the right to immediate possession of the property at the time of the taking by defendant.—*Kinsman v. Stanhope*, 41.

Same—Counterclaim—Purchase Price.

2. Defendant, who was sued for the conversion of an automobile taken under a chattel mortgage given him to secure the purchase price, could properly counterclaim for the balance of the purchase price.—*Kinsman v. Stanhope*, 41.

CONVICTS.

Pardons,—see Pardons, 1-4.

CORPORATIONS.

Contracts—How Enforced.

1. Like the agreement to take stock in a corporation to be formed, so one to the effect that the cost of constructing an irrigation project and the expense of maintaining it should be distributed among the stockholders in proportion to the number of shares held by each, is not a contract between the shareholders enforceable by one or more of them against the others, but one enforceable only by the corporation.—*Deschamps v. Loiselle*, 565.

Directors—Duties not Delegable.

2. Though it is competent for the directors of a corporation to conduct its business through duly authorized agents, they cannot abdicate their duties nor permit others to act in their stead for the corporation or the stockholders.—*Deschamps v. Loiselle*, 565.

Stockholders cannot Sue, Until When.

3. Stockholders cannot sue on behalf of the corporation until they have applied to the officers and directors for relief and have met with a refusal, or it is apparent that application to them for relief would be useless.—*Deschamps v. Loiselle*, 565.

COSTS.

See Receivers, 7.

COUNTERCLAIMS.

Splitting causes of action,—see Pleading and Practice, 7.

Conversion—Purchase Price.

1. Defendant, who was sued for the conversion of an automobile taken under a chattel mortgage given him to secure the purchase price, could properly counterclaim for the balance of the purchase price.—*Kinsman v. Stanhope*, 41.

COUNTIES.

Taxation for county high school purposes,—see Taxation, 8.
 Indebtedness—Limit of expenditures,—see Taxation, 8-10.
 See, also, County High Schools; County Commissioners; County Treasurer.

COUNTY COMMISSIONERS.

Expenditures for county high schools,—see Taxation, 6-10.
 Filling vacancy in board,—see Certiorari, 1.

COUNTY HIGH SCHOOLS.

Erecting buildings—Taxation,—see Taxation, 6-10.

COUNTY TREASURER.

Action on official bond,—see Statute of Limitations, 1.

CRIMINAL LAW.

Convicts—Pardons,—see Pardons, 1-4.

Indictment—Information—Procedure.

1. After dismissal of an indictment because of insufficiency, defendant could properly be charged with the same crime by information filed by order of the district court, without a preliminary examination.—State v. Vinn, 27.

Procedure—Waiver.

2. Under section 9194, Rev. Codes, by entering his plea without a written motion to set aside the information and consenting to go to trial, defendant waived his right to question the propriety of proceedings prior to the filing of the information.—State v. Vinn, 27.

Defective Indictment—Dismissal—Information.

3. Held, under section 8, Article III, of the Constitution, and section 9204, Revised Codes, that, after dismissal of an indictment, because of substantial defects therein, the district court may, but is not required to, submit the case to another grand jury, or permit, or order, the county attorney to file an information charging the defendant with the same offense ineffectually sought to be charged against him by the indictment.—State v. Vinn, 27.

Rape—Evidence—Admissibility.

4. In a trial for rape, the prosecuting witness was properly permitted to testify to acts of sexual intercourse between her and defendant prior to the date of the act charged in the information, such evidence being admissible in corroboration of her testimony relating to the act for which defendant was on trial.—State v. Vinn, 27.

Same—Age of Prosecutrix—Evidence—Admissibility.

5. Testimony, in a rape case, by prosecutrix that she derived knowledge of her age from statements made by her mother and from a certificate of baptism which she had seen at the home of her parents, was not objectionable as hearsay.—State v. Vinn, 27.

Same—Public Records—Evidence—Admissibility.

6. The school census of the county in which prosecutrix attended school, required by Chapter 76, Laws of 1913 (par. 3, sec. 512) to be kept by the superintendent of schools, was a public record, and as such admissible as *prima facie* evidence, among other things, of the age of prosecutrix.—State v. Vinn, 27.

Same—Evidence of Prosecutrix—Sufficiency.

7. Under Section 7861, Revised Codes, the evidence of the prosecutrix alone, if believed by the jury, is sufficient to sustain a conviction of the crime of rape.—State v. Vinn, 27.

Same—Evidence—Precautionary Instruction—Request.

8. In a prosecution for rape, where the court properly charged that conviction could be had upon the uncorroborated testimony of the prosecutrix, accused was not in a position to complain that the jury were not also charged to weigh her testimony in connection with the other evidence in the case, in the absence of a request and refusal of a special precautionary instruction.—State v. Vinn, 27.

Kidnaping—Information—Sufficiency.

9. Section 8306, Revised Codes, provides that every person who willfully seizes or inveigles another with intent to cause him to be *secretly* confined within the state, or sent out of the state, *etc.*, is guilty of kidnaping. *Held*, that an information which omitted the qualifying word “secretly” in charging the crime of kidnaping was nevertheless sufficient to support a conviction.—In re McDonald, 348.

CROSS-EXAMINATION.

See Evidence, 8.

CUSTOM.

Railroads permitting children to use tracks as a highway,—see Personal Injuries, 3.

DAMAGES.

General and special,—see Libel and Slander, 2-4.

Measure of—In action for damages for permitting animals to run at large,—see Animals, 5.

Mitigation of—Duty of plaintiff,—see Contracts, 3.

Nominal,—see New Trial, 3; Contracts, 2, 4.

Excessive,—see Verdicts.

DEATH.

Actions for damages,—see Personal Injuries.

DEEDS.

Deposit in escrow,—see Real Property, 1, 2.

Warranty deeds—Right of grantor to maintain suit to cancel outstanding mortgage,—see Real Property, 3.

DEFAULT JUDGMENTS.

Setting aside,—see Judgments.

DEFENSES.

Inconsistent,—see Pleading and Practice, 11.

DEMURRER.

Complaint—Ambiguity—Failure to demur—Effect,—see Waiver, 3.

DESCENT AND DISTRIBUTION.

Heirship—Statutes.

1. *Held*, under subdivisions 2 and 4 of section 4820, Revised Codes, that to enable nieces or nephews to share an estate with a surviv-

ing wife, there must be a surviving brother or sister of the decedent, and neither father nor mother.—*Brundy v. Canby*, 454.

DISBARMENT.

See Attorneys.

DISCRETION.

See, also, District Court, 2, 13, 15.

Deprivation of right to disqualify district judge under fair trial law,—see District Courts, 13, 15.

Reopening case,—see Pleading and Practice, 6.

Lease or sale of state lands,—see Mandamus, 4.

Vacating default,—see Judgments, 5, 6, 7, 10, 21.

Fixing Market Value.

1. Where no evidence was introduced on the question of the reasonable market value of machinery, either at the time plaintiff obtained it from the buyer or at the time it was sold, the original cost of which was \$1,300 and which was sold at sheriff's sale for \$330, neither the referee nor the court in adopting his finding was guilty of abuse of discretion in fixing its value at the latter sum.—*Columbus State Bank v. Erb*, 442.

DISMISSAL.

Of appeal from original judgment and after modification,—see Appeal and Error, 16.

Of cause on appeal, when,—see Appeal and Error, 9.

Of moot case,—see Appeal and Error, 14.

DISTRICT COURTS.

See, also, Attorneys; Contempt.

Appointment of district judges—Length of term,—see Office and Officers, 6.

Election to fill vacancy,—see Elections, 5–12.

Election Contests—Judicial Department—Infringement by Legislature.

1. *Held*, that since the requirement of section 49 of the Corrupt Practices Act (Laws 1913, p. 613), making it incumbent upon the district court in the case of a contest of the election of a state senator or representative, to hear the evidence and make findings to be transmitted to the secretary of state and by him delivered to the presiding officer of the senate or house, constitutes the judge of such court a mere agent of the legislature for the purpose of gathering evidence and making findings which have no binding force—a duty which, being nonjudicial in character, cannot be imposed upon judges—such provision is invalid.—*State ex rel. Smith v. District Courts*, 134.

New Trial—Hearing of Motion—Authority of Substituted Judge.

2. Like the judge who heard the cause, a district judge called in to pass upon a motion for a new trial therein may, in the exercise of a sound discretion and judging from the printed record before him, disregard any testimony which he deems unsatisfactory or improperly received.—*In re Williams' Estate*, 142.

Banks—Receivership—Parties—Right to Disqualify—District Judges.

3. By the appointment of a receiver in aid of a suit by the state against a bank to have it declared insolvent and its business wound up, the corporation was not deprived of its right, as a party to the

suit, to disqualify the judge before whom it was pending for imputed bias and prejudice, under amended section 6315, Revised Codes (Laws 1909, p. 161).—State ex rel. First T. & S. Bank v. District Court, 259.

Receivers—Orders—District Judges—Powers.

4. An order annulling an order appointing a receiver could properly be made by the successor in office of the judge who made the appointment.—Taintor v. St. John, 358.

Departments—Jurisdiction.

5. The departments into which a district court may be divided are co-ordinate, neither possessing any appellate or supervisory control over the other.—State ex rel. Carroll v. District Court, 428.

Same.

6. Where restoration of an incompetent person to capacity had been denied by one department of a district court, it was improper for another department of the same court on *habeas corpus*, within two weeks thereafter and upon substantially the same state of facts, to order the discharge of such person from the custody of her guardian.—State ex rel. Carroll v. District Court, 428.

Disqualification of District Judges—Right of Defendant.

7. A defendant, though in default, is still a "party," so far at least as to entitle him to move to set it aside (or to take and prosecute an appeal), and as such may by filing the affidavit prescribed by section 6315, Revised Codes, as amended (Laws 1909, Chap. 114), disqualify the district judge, who, after denying the motion to vacate, had granted a rehearing.—State ex rel. Working v. District Court, 435.

Same—Excess of Jurisdiction—Certiorari.

8. *Held*, on *certiorari*, that after a disqualifying affidavit had been filed against a district judge under the provisions of section 6315, Revised Codes, as amended, he was deprived of further jurisdiction in the matter of hearing a renewed motion to set aside a default, and exceeded his authority in vacating the order granting a rehearing thereof, the reason or reasons which prompted his action being immaterial.—State ex rel. Working v. District Court, 435.

May Direct Verdict, When.

9. If the evidence in a jury case is such that reasonable men can come to but one conclusion thereon, the court may direct a verdict in favor of the party entitled to it, or withdraw the case from the jury and render judgment.—Milwaukee Land Co. v. Ruesink, 489.

Record—New Trial—Nonconflicting Evidence—Duty of Judge Called in.

10. A district judge called in to determine a motion for a new trial asked for, among other grounds, because of the alleged insufficiency of the evidence to justify the findings of the trial judge, was required to determine, not whether the evidence was sufficient to warrant any particular finding, but whether the final conclusion in view of the evidence in the printed record, was justified.—Milwaukee Land Co. v. Ruesink, 489.

Supervisory Courts of—District Judges—Disqualification—Abridgment of Right.

11. The right conferred by subdivision 4 of section 6315, Revised Codes, as amended (Laws 1909, p. 161), upon parties to disqualify a district judge for imputed bias or prejudice, cannot be abridged merely because it is subject to abuse.—State ex rel. Carroll v. District Court, 506.

Same—Right of Disqualification—"Party."

12. A guardian of the person and estate of an incompetent, is a "party," within the meaning of section 6315, Revised Codes, *supra*, to a proceeding to have such incompetent declared competent, and may therefore exercise the right to disqualify the district judge by filing the affidavit provided for therein.—*State ex rel. Carroll v. District Court*, 506.

Same—Order Depriving Party of Right—Abuse of Discretion.

13. Section 6315, *supra*, provides that the affidavit necessary to bring about the disqualification of a district judge for imputed bias or prejudice must be filed at any time before the day fixed for the hearing, *etc.* The petition in a proceeding seeking the restoration of an incompetent to capacity was filed just before the closing hour of the business day; service upon the guardian of such person was made at 11 o'clock P. M. of the same day; the hearing was ordered set for the following day at 2 o'clock P. M. *Held*, that by the course pursued the court deprived the guardian of the right of disqualification conferred by section 6315, and order fixing day of hearing annulled as an abuse of discretion.—*State ex rel. Carroll v. District Court*, 506.

Same—Continuance—Filing of Affidavit—When too Late.

14. A continuance in the circumstances recited in paragraph 13, *supra*, would have been fatal to relator, under *State ex rel. Jacobs v. District Court*, 48 Mont. 410.—*State ex rel. Carroll v. District Court*, 506.

Same—Disqualification of District Judges—Deprivation of Right—Abuse of Discretion.

15. A proceeding looking to the removal of a guardian of the person and estate of an incompetent was transferred from one department to another of a district court, ten minutes before the closing hour of the business day; the judge of the latter department on the next day made an order setting the hearing for 3 o'clock P. M. of the same day, service being made upon the guardian at 10:30 o'clock A. M. *Held*, under *State ex rel. Carroll v. District Court*, *supra*, that the order setting the hearing for the hour at which it was fixed was an abuse of discretion, and therefore void.—*State ex rel. Carroll v. District Court*, 510.

DIVORCE.

Support and Maintenance—Modification of Decree—Showing Necessary.

1. A modification of a decree of divorce embodying a provision for the support of the wife or children ought to be made only upon good cause shown.—*Brice v. Brice*, 388.

Same—Burden of Proof.

2. Where a divorced wife makes application for an increased allowance for her own support, or that of her children whose custody was decreed to her, it must appear that her or their needs are such as to render a larger allowance necessary and that the husband, by reason of a change in his circumstances, is able to pay the additional amount, the burden of proof being upon the applicant.—*Brice v. Brice*, 388.

Same—Modification of Decree—Estoppel.

3. The parties to a divorce proceeding in which a certain allowance is made to the wife for her support, by failing to appeal from the order within time are conclusively bound thereby, even though the allowance prove inadequate.—*Brice v. Brice*, 388.

Support of Children—Effect of Agreement Between Parties.

4. While an agreement between husband and wife touching the custody and maintenance of the children will be enforced, it cannot as against the children divest either parent of the duty to support and educate them.—*Brice v. Brice*, 388.

Support and Maintenance—Proper Modification of Decree.

5. Where it appeared that, after transfer by a husband to his wife of all his property, amounting to \$5,000, she was granted a divorce, he to pay \$150 per annum for the maintenance of their two children, whose custody was awarded to the mother, and the latter eight years thereafter applied for a modification of the decree so as to grant a larger allowance for the maintenance of the minor daughter who was in ill health, the mother no longer being able to properly support her, and that the husband was earning a comfortable income as a physician and possessed unencumbered property amounting to \$4,000, a modification of the decree so as to require him to pay \$30 per month for the support of the daughter was proper.—*Brice v. Brice*, 388.

Appeal—Evidence—Affidavits—How Viewed.

6. Where an application for a larger allowance to a divorced wife for the support of her children, was tried in the district court wholly upon evidence in the form of affidavits, the supreme court, on appeal, will treat the application as if originally made to and tried by it, and determine the value of the evidence accordingly.—*Brice v. Brice*, 388.

DOWER.**Relinquishment—"Conveyance"—Definition.**

1. A "conveyance" of land, within the meaning of section 3708, Revised Codes, by joining in which a widow will be held to have relinquished her right of dower in the realty, is one effective to transfer title at the time it is made.—*Tyler v. Tyler*, 65.

Right of Widow.

2. *Held*, that where a wife joined her husband in an option contract on land owned by the latter, executing and depositing a deed in escrow, and the husband died before the holders of the option exercised their right and received the deed from the depository, the widow was entitled to one-half of the net proceeds of such sale, in lieu of dower, her right to claim one-half of the real estate of her husband, granted by section 3716, Revised Codes, having attached before the deed became effective to divest deceased of title.—*Tyler v. Tyler*, 65.

ELECTION OF REMEDIES.

See *Contracts*, 13; *Sales*, 8, 9.

ELECTIONS.**Election Contests—Legislature—How Determined.**

1. The provision of section 9, Article V of the state Constitution that each house of the legislative assembly shall judge of the elections, qualifications, etc. of its members, is a power granted by the people which cannot be delegated by either or both acting together. Neither house can divest itself of the power conferred upon it, and no person, officer or court can infringe upon the exclusive privilege granted.—*State ex rel. Smith v. District Court*, 134.

Same—Judicial Department—Infringement by Legislature.

2. *Held*, that since the requirement of section 49 of the Corrupt Practices Act (Laws 1913, p. 613), making it incumbent upon the district court in the case of a contest of the election of a state senator or representative, to hear the evidence and make findings to be transmitted to the secretary of state and by him delivered to the presiding officer of the senate or house, constitutes the judge of such court a mere agent of the legislature for the purpose of gathering evidence and making findings which have no binding force—a duty which, being nonjudicial in character, cannot be imposed upon judges—such provision is invalid. *State ex rel. Smith v. District Court*, 134.

Same—Statement—Untimely Filing—Effect.

3. A statement of contest, involving the office of state senator, not filed within twenty days after a certificate of election had been issued to the contestee (Rev. Codes, sec. 83), was ineffective for any purpose, and the clerk of the district court was therefore not required to issue a commission to two justices of the county to take the depositions of the witnesses who might be called by the parties.—*State ex rel. Smith v. District Court*, 134.

Same—Members of Legislature—Statutes.

4. While failure on the part of a contestant to file his statement of contest within the twenty-day period precludes him from having depositions taken as provided in sections 84 to 87, Revised Codes, it does not deprive him of the right to have the contest heard under the power conferred upon both houses of the legislature by section 9 of Article V of the Constitution.—*State ex rel. Smith v. District Court*, 134.

Contest—Estoppel.

5. A district judge appointed for a longer term than contemplated by the Constitution was not estopped from claiming title to the office in *quo warranto* proceedings, by the fact that he entered into a contest for the office at the election occurring two years before his term under the appointment expired.—*State ex rel. Patterson v. Lentz*, 322.

Vacancies—Special Elections.

6. An election to fill a vacancy is a special election.—*State ex rel. Patterson v. Lentz*, 322.

Special Elections—Procedure—Statutes.

7. *Held*, that the provisions of sections 452–455, Revised Codes, sufficiently prescribe the mode for holding a special election.—*State ex rel. Patterson v. Lentz*, 322.

Vacancies—Proclamation—Duty of Governor.

8. In view of the provisions of sections 452 and 453 and 6269, Revised Codes, it is incumbent upon the governor to include in his election proclamation specific mention of the fact that in a particular judicial district a vacancy exists in the office of judge, then filled by an appointee, and that his successor is to be elected at the coming general election.—*State ex rel. Patterson v. Lentz*, 322.

General and Special Elections—Notice—Presumptions.

9. Though the electors are presumed to know what offices are usually to be filled at a general election, they cannot be presumed to know the fact that a special election is to be held to fill an office for an unexpired term.—*State ex rel. Patterson v. Lentz*, 322.

Proclamation—Insufficiency.

10. A statement in the proclamation of the governor giving notice of a general election, that among other officers there was to be elected “also a district judge in any judicial district where a vacancy may exist,”

was not such a notice of the necessity of filling a vacancy by election as required by sections 452, 453 and 6269, Revised Codes.—State ex rel. Patterson v. Lentz, 322.

Notice—Sufficiency—Contest Before and After Election—Rule.

11. After an election has been held, the rule as to the necessity of official proclamation and notice thereof does not apply with the same rigor as where the proceedings are attacked before its occurrence, the rule being that no informality in the election will suffice to defeat the popular will as expressed by their votes, if in fact it appears that they had actual, though not official, notice, and voted generally.—State ex rel. Patterson v. Lentz, 322.

Same—Sufficiency—Evidence.

12. Evidence in an election contest *held* sufficient, under the rule above, to show that the electors had actual notice of an election to fill a vacancy in the office of district judge then held by appointment, though the official notice did not meet statutory requirements, and though the number of votes cast for the candidates for this office, when compared with the number received by a candidate for an office of like dignity, was small.—State ex rel. Patterson v. Lentz, 322.

EQUITY.

See particular subject relating to.

ESTOPPEL.

See, also, Pleading and Practice, 8; Contracts, 13.

Office—Appointment—Election—Contest.

1. A district judge appointed for a longer term than contemplated by the Constitution was not estopped from claiming title to the office in *quo warranto* proceedings, by the fact that he entered into a contest for the office at the election occurring two years before his term under the appointment expired.—State ex rel. Patterson v. Lentz, 322.

Receivers—Validity of Appointment—Failure to Appeal.

2. Neither failure to appeal from an order appointing a receiver, nor subsequent orders of the judge directing the receiver in the management and disposition of the property in his charge, were conclusive as to the propriety of the appointment so as to prevent a subsequent order annulling it.—Taintor v. St. John, 358.

Divorce—Modification of Decree—Failure to Appeal.

3. The parties to a divorce proceeding in which a certain allowance is made to the wife for her support, by failing to appeal from the order within time, are conclusively bound thereby, even though the allowance prove inadequate.—Brice v. Brice, 388.

Promissory Notes—Impairing Mortgage Security.

4. Where indorsers on a note knew of, and impliedly gave their assent to, sales of livestock mortgaged to secure it, they were estopped to insist that the mortgagee, by permitting the mortgagor to make the sales, had impaired the mortgage security and that they had been injured by the mortgagor's mismanagement and misappropriation of the proceeds.—Columbus State Bank v. Erb, 442.

Cancellation of Instruments—Retention of Benefits.

5. Plaintiff, who was the sole heir of her deceased husband but mistakenly believed others to be heirs, and under such belief, jointly with them, executed an instrument of sale whereby only one-half of the purchase price was to be paid to her, whereas she was entitled to the whole thereof, was not estopped to seek cancellation of the instrument

by reason of her receipt and retention of her proportion of the first installment of the purchase price.—*Brundy v. Canby*, 454.

Estoppel by Ratification—What Does not Constitute.

6. An act done in ignorance of one's rights or under the influence of the mistake which induced the contract sought to be canceled does not constitute an estoppel by ratification.—*Brundy v. Canby*, 454.

ESCROWS.

See Real Property, 1, 2.

EVIDENCE.

See, also, Criminal Law.

Consisting of affidavits—How viewed on appeal,—see Appeal and Error, 13.
Nonconflicting, how viewed on appeal,—see Appeal and Error, 17, 18.

Public Records—Admissibility.

1. The school census of the county in which prosecutrix attended school, required by Chapter 76, Laws of 1913 (par. 3, sec. 512), to be kept by the superintendent of schools, was a public record, and as such admissible as *prima facie* evidence of the age of prosecutrix.—*State v. Vinn*, 27.

Credibility of Witnesses—Jury Question.

2. The question of the credibility of the witnesses and the weight of the testimony are for the jury.—*State v. Vinn*, 27.

Written Contracts—Change in—Parol Testimony—Inadmissibility.

3. Under section 5067, Revised Codes, an agreement resting in parol and not fully executed could not alter a prior written contract, and was therefore properly excluded from evidence.—*Kinsman v. Stanhope*, 41.

Wills—Subscribing Witnesses—Admissibility of Evidence.

4. Where the attesting witnesses to a will are present in the county, they must, under Rev. Codes, sec. 7400, in a contest, be called and examined, and other testimony to prove the will cannot be received to the exclusion of theirs. Where, however, one is absent and his deposition is introduced, evidence of one not an attesting witness may properly be received to supplement the testimony of the subscribing witness who is present at the hearing.—*In re Williams' Estate*, 142.

Same—Conversation Between Witnesses—Inadmissibility.

5. Evidence of a conversation between the two subscribing witnesses to a will mentioned above, in which one was said to have told the other that testatrix had stated to him at the time they signed it that the instrument was her will, was inadmissible in proponents' case in chief, as well as in rebuttal where no foundation had been laid.—*In re Williams' Estate*, 142.

Witnesses—Credibility.

6. Where defendant contractor promptly paid for all brick delivered and used them in the construction of a building, without complaint that they were not of suitable quality, the court did not abuse its discretion in disregarding his testimony in support of his counterclaim based on their alleged unfitness for use in the walls of a building.—*Busbee v. Gagnon Co.*, 203.

Checks—Evidence—Admissibility.

7. Plaintiff having alleged in his complaint that he had given to defendant a check as part payment to insure acceptance of goods, evidence that upon inquiry of the bank upon which it was drawn, whether it was good, a negative answer was received, was properly admitted.—*Jenderson v. Hansen*, 216.

Same—Proper Cross-examination.

8. Cross-examination of plaintiff, who had testified that he had given a check for \$100 in part payment, whether he had to exceed half that amount in the bank at that time, was proper.—*Jenderson v. Hansen*, 216.

Same—Telephone Conversations—Admissibility.

9. Inquiry of the bank on which a buyer had given him a check, whether there were funds sufficient to meet it, could properly be made by the seller in person, or by telephone, or through another; hence evidence that the desired information was obtained through the medium of an employee of another bank by telephone was admissible.—*Jenderson v. Hansen*, 216.

Records—Attestation—Faulty Certificate—Evidence.

10. A copy of a judgment-roll of a court of another state, the certificate of attestation to which was to the effect that "said certificate of said clerk is duly authorized by law to be issued by such clerk, and full faith and credit are due to all his official acts as such," instead of that "the attestation is in due form," as required by section 7911, Revised Codes, was inadmissible in evidence.—*Adams v. Stenehjelm*, Admr., 232.

Same—Full Faith and Credit.

11. Whether a record of another state is entitled to full faith and credit in this state is a question to be determined by the court in which it is offered in evidence, and not by the judge of the court from which it comes.—*Adams v. Stenehjelm*, Admr., 232.

Valid Judgment—Evidence.

12. Before the courts of this state can give faith and credit to a judgment of a foreign state, the evidence offered must disclose that it is valid and capable of enforcement by final process.—*Adams v. Stenehjelm*, Admr., 232.

Entry of Judgment.

13. In an action to recover upon a judgment rendered in another state, failure of plaintiff to show that it was entered in the court of its rendition was a failure to prove a judgment capable of enforcement.—*Adams v. Stenehjelm*, Admr., 232.

Book Entries—When Inadmissible.

14. Where, in an action to recover on a foreign judgment, plaintiff did not make proof that the clerk of the court where it was rendered was required by law to keep a judgment docket and make a memorandum therein that judgment had been entered, evidence that an entry to that effect in such a book had been made was immaterial.—*Adams v. Stenehjelm*, Admr., 232.

Weight—How Determined.

15. The legal value of the evidence of a witness is not determined by his positive assertions alone, but by its entire content in the light of his admissions and contradictions.—*Rood v. Murray*, 240.

Positive and Negative Testimony—Weight—Jury Question.

16. The conflict presented by the positive testimony of defendant company's train crew that the bell of its locomotive was ringing at the time of the accident, and the negative statements of plaintiff and his witnesses that they heard no bell, was one properly submitted to the jury for solution.—*Mullery v. Great Northern Ry. Co.*, 408.

Admissions—Jury Question.

17. Whether immediately after the accident, plaintiff made statements that his injury was due to his own carelessness—of which he disclaimed any recollection—whether, when made, he was fully conscious of their

purport, and whether their purport constituted an admission of legal negligence, were questions for determination by the jury.—*Mullery v. Great Northern Ry. Co.*, 408.

Personal Injuries—Earning Capacity—Evidence—Admissibility.

18. Where plaintiff, by trade a carpenter, was injured while working in a smelter, he was not, in showing his earning capacity, confined to his then occupation as a standard, but was properly allowed to introduce evidence that the going wage of carpenters at the place of the accident was \$1.75 per day more than he was receiving at the time of its occurrence.—*Mullery v. Great Northern Ry. Co.*, 408.

Hearsay.

19. A copy of a copy of items of sales of livestock, made in a pocket memorandum-book which, as well as the first copy, had been lost, was hearsay and properly excluded.—*Columbus State Bank v. Erb*, 442.

Same—Market Value.

20. While the original cost price of an article, as well as the amount it brought at sheriff's sale, is some evidence of its market value, neither is conclusive.—*Columbus State Bank v. Erb*, 442.

Same.

21. Where no evidence was introduced on the question of the reasonable market value of machinery, either at the time plaintiff obtained it from the buyer or at the time it was sold, the original cost of which was \$1,300 and which was sold at sheriff's sale for \$330, neither the referee nor the court in adopting his finding was guilty of abuse of discretion in fixing its value at the latter sum.—*Columbus State Bank v. Erb*, 442.

***Res Ipsa Loquitur*—Inapplicability of Doctrine.**

22. The rule "*res ipsa loquitur*" goes no further than to make out a *prima facie* case; it has the force and effect of a disputable presumption and cannot exist where facts are known and where from the evidence different inferences may be drawn as to the producing cause of the injury.—*Lyon v. Chicago, Milwaukee & St. P. Ry. Co.*, 532.

Same.

23. Where plaintiff had produced evidence sufficient to make out a *prima facie* case of the negligence alleged in her complaint, she could not in addition invoke the doctrine of *res ipsa loquitur*, since such a course would have permitted the jury to give double weight to the evidence, to the facts as shown, and to the inference or presumption deduced by the law from the existence of those facts.—*Lyon v. Chicago, Milwaukee & St. P. Ry. Co.*, 532.

FEEES.

Of executors,—see Probate Proceedings, 1.

FENCES.

Duty of railroads to maintain along tracks,—see Personal Injuries, 1.

FINDINGS.

Error—When Immaterial.

1. Where findings excepted to are unnecessary to a decision, error in making them will not work a reversal of the decree.—*Brundy v. Canby*, 454.

Refusal—When not Error.

2. Refusal to make findings upon matters not at issue is not error.—*Brundy v. Canby*, 454.

When Formal Findings Unnecessary.

3. In a case tried without the aid of a jury, the evidence justifying but one conclusion, the court need not make formal findings even though request be made for them.—*Milwaukee Land Co. v. Ruesink*, 489.

Defective Findings—Nonconflicting Evidence—Review.

4. Where, in a case of the character referred to in paragraph 3 *supra*, the court makes findings, defects in them, though excepted to, do not call for a reversal of the judgment, but will be ignored and the conclusion of the trial court reviewed upon an examination of the whole of the evidence in the record.—*Milwaukee Land Co. v. Ruesink*, 489.

FORECLOSURE.

See Mortgages, 1.

FORFEITURES.

See Real Property, 9, 10, 11, 18, 19.

FRAUD.

See Contracts, 13, 14.

GOVERNOR.

Election proclamations,—see Elections, 8.

GUARDIAN AND WARD.

Incompetents—Powers.

1. One having the guardianship of the estate of an incompetent must, under the Code provisions applicable, of necessity also be guardian of his person.—*State ex rel. Carroll v. District Court*, 428.

Same—"Mentally Incompetent"—Definition.

2. *Held*, that the words "mentally incompetent," as used in section 7764, Revised Codes, mean a person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, without assistance, to properly manage and take care of himself and his property.—*State ex rel. Carroll v. District Court*, 428.

HABEAS CORPUS.

See, also, Contempt, 2.

Appeal.

1. Availability of the remedy by appeal is not a bar to relief by the writ of *habeas corpus* to one imprisoned for crime under an alleged void judgment.—*In re McDonald*, 348.

Scope of Writ.

2. *Quære*: Has the district court jurisdiction, in *habeas corpus* proceedings, to discharge from custody one held under guardianship as an incompetent person?—*State ex rel. Carroll v. District Court*, 428.

District Court—Jurisdiction.

3. Where restoration of an incompetent person to capacity had been denied by one department of a district court, it was improper for another department of the same court on *habeas corpus*, within two weeks thereafter and upon substantially the same state of facts, to order the discharge of such person from the custody of her guardian.—*State ex rel. Carroll v. District Court*, 428.

HEIRSHIP.

See Descent and Distribution.

INSTRUCTIONS.

627

HUSBAND AND WIFE.

See Divorce; Dower, 1, 2; Descent and Distribution, 1.

INCOMPETENTS.

See Guardian and Ward, 1, 2.

INDEBTEDNESS.

See Taxation, 6-10.

INDICTMENTS AND INFORMATION.

See Criminal Law, 1-3, 9.

INFANTS.

See, also, Personal Injuries, 1-4.

Support—Duty of parents,—see Divorce.

INITIATIVE AND REFERENDUM.

Effect of Statute Initiated by Electors.

1. An Act initiated by the people has no greater efficacy than one enacted by the legislature, in so far as its constitutionality is concerned. State ex rel. Smith v. District Court, 134.

INJUNCTIONS.

Illegal Taxation—Proper Remedy.

1. Where the taxing authorities levy a tax not authorized by law, or upon property not subject to be taxed, their action is without jurisdiction and wholly void, and the remedy by injunction is available; in such a case it is not necessary that the owner first exhaust the remedy provided by amended section 2743, Revised Codes (Laws 1909, Chap. 135), by appearing before the county board of equalization and making timely objection to the assessment.—Barnard Realty Co. v. City of Butte, 159.

Delinquent Tax Sales—Complaint—Insufficiency.

2. Where it appeared from the complaint in an action to enjoin a county treasurer from selling land for delinquent taxes, that plaintiff had neither equitable nor legal title to the land but only a preferential right of entry, the threatened sale could not cast a cloud upon his title as alleged, and a general demurrer to the complaint was properly sustained.—Johnson v. County of Lincoln, 253.

INSTRUCTIONS.

Evidence—Precautionary Instruction—Request.

1. In a prosecution for rape, where the court properly charged that conviction could be had upon the uncorroborated testimony of the prosecutrix, accused was not in a position to complain that the jury were not also charged to weigh her testimony in connection with the other evidence in the case, in the absence of a request and refusal of a special precautionary instruction.—State v. Vinn, 27.

Assumption of Fact—Proper Refusal.

2. An instruction requested by plaintiff which assumes as a basis for the defense facts which were not supported by the evidence, was properly refused.—Jenderson v. Hansen, 216.

Personal Injuries—Earning Capacity—Proper Instruction.

3. An instruction authorizing the jury to consider plaintiff's disability, if any, to pursue his usual vocation, in addition to the impair-

ment of his earning capacity, in arriving at their verdict, *held* not open to objection.—*Mullery v. Great Northern Ry. Co.*, 408.

INTERPLEADER.

Equity—Jury Trial.

1. A suit in interpleader is equitable in its nature, in which neither party is entitled to a jury trial as a matter of right; hence where a jury had been called, but disagreed, the court was within the rightful exercise of its authority in discharging them and deciding the controversy itself.—*Missoula Trust & Savings Bank v. Iman & Son*, 355.

JUDGMENT-ROLL.

Authentication,—see Appeal and Error, 12.

JUDGMENTS.

Entry After Verdict—Stay.

1. Under section 6800, Revised Codes, which requires entry of judgment within twenty-four hours after rendition of the verdict, unless the case is reserved for argument or further consideration or a stay of proceedings is granted, neither reservation nor stay can be allowed by the court *ex gratia* or without adequate reason.—*State ex rel. Jones v. District Court*, 1.

Stay After Verdict in Aid of New Trial.

2. In the absence of consent, a stay of proceedings after verdict and before entry of judgment, in aid of a new trial, cannot be had, since a stay for that purpose can be granted only after notice of intention to move for a retrial, and such notice cannot be given until after entry of judgment.—*State ex rel. Jones v. District Court*, 1.

Entry—Reservation for Argument—Power of Court.

3. *Held*, that a case may, after verdict, be reserved for argument, under section 6800, Revised Codes, only when the judgment does not necessarily follow the verdict, or where, after the discharge of the jury, the verdict is claimed to be unresponsive to the issues, or so ambiguous or informal that no proper judgment can be entered in conformity therewith.—*State ex rel. Jones v. District Court*, 1.

Entry *Nunc Pro Tunc*—When.

4. Where the entry of judgment within twenty-four hours after rendition of verdict was prevented by an unauthorized order of the trial judge, the successful party is, upon vacation of such order, entitled to have it entered *nunc pro tunc*.—*State ex rel. Jones v. District Court*, 1.

Default Judgment—Setting Aside—Discretion.

5. The matter of relieving a party of a default judgment is one addressed to the sound, legal discretion of the trial court, even though movant has made an affirmative showing of mistake, inadvertence or excusable neglect.—*Kersten v. Coleman*, 82.

Same—Refusal to Set Aside—When Justified.

6. Where defendant permitted twelve days to elapse between the day he became aware of the entry of default against him and the day he moved to have it set aside, after formal proof had been made and judgment entered, giving no excuse for his failure to appear, other than that he believed in good faith that twenty days after June 6 (the day summons was served) would include June 30, refusal to set it aside was justified.—*Kersten v. Coleman*, 82.

Same—Entry—Order to Strike—Error.

7. *Held*, on *certiorari*, that where the district court, after overruling a demurrer to an amended complaint, directed an answer to be filed within

ten days, and none was filed, though it was served upon counsel for plaintiff within time, entry of default by the clerk upon request of counsel for plaintiff was proper under section 6719, Revised Codes; and that, while the court could, in its discretion and upon a proper showing, set aside the default, it exceeded its jurisdiction in ordering it stricken from the files on the ground that the clerk was without authority in law to enter it.—*State ex rel. Smotherman v. District Court*, 119.

Same—Record on Appeal.

8. On appeal from an order vacating a default judgment, the judgment-roll is no part of the record; the papers used on the hearing resulting in such order, constitute the record and must be authenticated by their incorporation in a bill of exceptions duly settled by the presiding judge.—*Beller v. Le Boeuf*, 192.

Same—Record—Sufficiency.

9. On appeal from an order vacating a default judgment, a transcript certified by the clerk as a true copy of plaintiff's bill of exceptions, purporting to be a narrative of the proceedings had and done in respect to the motion to vacate and as containing all the papers relative thereto, and settled and certified by the judge as a true and correct record of the proceedings, sufficiently complied with section 7113, Rev. Codes, relative to what the record on appeal in such cases shall contain. *Beller v. Le Boeuf*, 192.

Same—Vacation—Grounds—Presumptions.

10. Where, on a motion to vacate a default judgment, there was no showing whatever of excusable neglect or of the existence of any meritorious defense, it must be assumed that the order vacating the judgment was not made on discretionary grounds.—*Beller v. Le Boeuf*, 192.

Same—Conflicting Affidavits—Effect.

11. Where the only ground upon which an order setting aside a default could be justified was that the judgment was premature and therefore void, and the affidavits of opposing counsel as to when service of the complaint was made were conflicting, the ruling of the trial court was conclusive.—*Beller v. Le Boeuf*, 192.

Foreign Records—Authentication—Certificate.

12. The words "in due form" as used in section 7911, Revised Codes, in declaring that the certificate of the presiding judge of a court of another state must disclose that the attestation of the clerk of such court to a judicial record which is sought to be proved in a court of this state is "in due form," means the form prescribed by the law or practice of the state from which the record comes.—*Adams v. Stenehjem*, 232.

Authentication—How Determined—Judicial Notice.

13. Whether the attestation by a clerk of court of another state to one of its judicial records is in due form as defined above, must be determined from the certificate of the judge of such court, since the courts of this state do not take judicial notice of the statute laws or practice of a foreign state.—*Adams v. Stenehjem*, 232.

Same—Attestation—Faulty Certificate—Evidence.

14. A copy of a judgment-roll of a court of another state, the certificate of attestation to which was to the effect that "said certificate of said clerk is duly authorized by law to be issued by such clerk, and full faith and credit are due to all his official acts as such," instead of that "the attestation is in due form," as required by section 7911, Revised Codes, was inadmissible in evidence.—*Adams v. Stenehjem*, 232.

Records—Full Faith and Credit.

15. Whether a record of another state is entitled to full faith and credit in this state is a question to be determined by the court in which it is offered in evidence, and not by the judge of the court from which it comes.—*Adams v. Stenehjelm*, 232.

Valid Judgment—Evidence.

16. Before the courts of this state can give faith and credit to a judgment of a foreign state, the evidence offered must disclose that it is valid and capable of enforcement by final process.—*Adams v. Stenehjelm*, 232.

Entry of Judgment.

17. In an action to recover upon a judgment rendered in another state, failure of plaintiff to show that it was entered in the court of its rendition was a failure to prove a judgment capable of enforcement.—*Adams v. Stenehjelm*, 232.

Validity—How Determined.

18. The validity of a judgment must be determined by the laws of the state where it was rendered.—*Adams v. Stenehjelm*, 232.

Book Entries—Evidence—When Inadmissible.

19. Where, in an action to recover on a foreign judgment, plaintiff did not make proof that the clerk of the court where it was rendered was required by law to keep a judgment docket and make a memorandum therein that judgment had been entered, evidence that an entry to that effect in such a book had been made was immaterial.—*Adams v. Stenehjelm*, 232.

Default Judgments—Setting Aside—Rehearing—Effect of Order.

20. The effect of an order granting leave to renew a motion, on a day fixed, to vacate a default, was to annul the order theretofore made denying the motion, and to set it for hearing on its merits the same as if it had not been heard before.—*State ex rel. Working v. District Court*, 435.

Same—Motions—Rehearing—Power of Court.

21. The district court has power to grant a rehearing upon a motion to open a default when additional facts are presented or defects in the proof are supplied, or even upon the same state of facts, and its ruling will not be disturbed except in case of absence of discretion.—*State ex rel. Working v. District Court*, 435.

Same—Renewal of Motion—Practice.

22. While it is the better practice to have the order denying a motion to vacate a default recite that it is made without prejudice or that permission is granted to renew the motion, yet where neither course is pursued and the renewed motion has been heard and disposed of upon its merits, it will be presumed that leave was previously granted.—*State ex rel. Working v. District Court*, 435.

Modified Judgment—Appeal from Original Judgment.

23. Where the district court on motion for new trial modified the judgment in a personal injury action, by scaling the verdict, with the consent of plaintiff, the judgment as modified superseded the original one, and an appeal from the latter did not lie.—*Chenoweth v. Great Northern Ry. Co.*, 481.

JUDICIAL NOTICE.

See Judgments, 13.

JURISDICTION.

See Justices of the Peace; District Courts.

JURY.

Credibility of Witnesses—Jury Question.

1. The question of the credibility of the witnesses and the weight of the testimony are for the jury.—*State v. Vinn*, 27.

View of Premises by Jury—Effect.

2. The fact that the jury had visited and examined the land in controversy before rendering their verdict in favor of plaintiff was not sufficient to overcome the import of the statements and admissions of plaintiff and his witnesses as to the defective character of a work for which compensation was claimed.—*Waite v. Shoemaker Co.*, 264.

Interpleader—Equity—Jury Trial.

3. A suit in interpleader is equitable in its nature, in which neither party is entitled to a jury trial as a matter of right; hence where a jury had been called, but disagreed, the court was within the rightful exercise of its authority in discharging them and deciding the controversy itself.—*Missoula Trust & Savings Bank v. Iman & Son*, 355.

Peremptory Challenges—"Each Party"—Definition.

4. The provision of section 6740, Revised Codes, that "each party" to a civil action shall be entitled to four peremptory challenges, held to mean each side or party litigant, and not each person of whom the respective sides or parties litigant are made up.—*Mullery v. Great Northern Ry. Co.*, 408.

Same—Antagonistic Codefendants—Peremptory Challenges.

5. Though each of two or more codefendants who are hostile to each other is entitled to the number of peremptory challenges of jurors allowed by section 6740, Revised Codes, to parties litigant, where neither their joint answer, which asserted defenses common to all, nor the evidence disclosed any conflict of interest, they constituted but one party and as such were entitled to but four peremptory challenges under the rule declared in paragraph 4, *supra*.—*Mullery v. Great Northern Ry. Co.*, 408; *Chenoweth v. Great Northern Ry. Co.*, 481.

Peremptory Challenges—Waiver.

6. Where codefendants, though antagonistic to each other, do not separately attempt to exercise their right to peremptorily challenge the jurors in turn with the plaintiff, they waive their right in this respect.—*Chenoweth v. Great Northern Ry. Co.*, 481.

JUSTICES OF THE PEACE.

Unauthorized Continuances—Jurisdiction—Void Judgment.

1. Where a justice of the peace continued a cause upon the oral application of plaintiff made out of court without a showing such as required by section 7036, Revised Codes, and refused to dispose of the cause at the time originally set for hearing, he lost jurisdiction, and a judgment entered by him after hearing testimony in support of the complaint at the time to which the cause had been continued, was void.—*State ex rel. Akin v. Williams*, 582.

KIDNAPING.

Information,—see Criminal Law, 9.

LACHES.

Presumptions.

1. Though laches may arise from an unexplained delay short of the period fixed by the statute of limitations, it will not be presumed from such a delay alone; unless it is made to appear affirmatively that un-

usual circumstances exist which, on account of such delay, render the proceeding inequitable, relief cannot be denied.—Brundy v. Canby, 454.

Complaint.

2. A mere delay in commencing suit, short of the period of limitation, need not be excused in the complaint.—Brundy v. Canby, 454.

Doctrine Inapplicable, When.

3. The application of the doctrine of laches held inapplicable, where the circumstances were such as to excuse a failure to discover a mistake of law, and the situation of the defendants had not changed to their prejudice.—Brundy v. Canby, 454.

LAND GRANTS.

See Railroads, 9-12.

LEASES.

State lands,—see Mandamus, 4, 5.

LEGISLATIVE ASSEMBLY.

Election contests,—see Elections, 1-4.

LIBEL AND SLANDER.

Libel—Pleadings.

1. Plaintiff in an action for libel can recover only, if at all, for the publication of the particular matter referred to in the complaint. Words not pleaded, though published at the same time, cannot be relied on.—Lemmer v. The "Tribune," 559.

Same—General Damages—Language must be Libelous *Per Se*.

2. To state a cause of action for general damages for libel, the language complained of must be libelous *per se*; i. e., such as, without the aid of innuendo, imputes to plaintiff the commission of a crime or necessarily exposes him to hatred, contempt, ridicule or obloquy.—Lemmer v. The "Tribune," 559.

Same—What not Libelous *Per Se*.

3. Held, that language published by defendant the necessary inferences from which were, that plaintiff died from an overdose of morphine, procured on a doctor's prescription by a stranger at plaintiff's instance, was not libelous *per se*.—Lemmer v. The "Tribune," 559.

Same—Special Damages—Complaint—Insufficiency.

4. Where special damages are sought for a libelous publication, the facts showing such damages must be alleged; hence a general allegation that plaintiff was damaged in his business in consequence of the publication of the article referred to above was insufficient in this respect.—Lemmer v. The "Tribune," 559.

LIENS.

See Mechanics' and Materialmen's Liens; Mortgages.

LIMITATIONS OF ACTIONS.

See Statute of Limitations.

LIVESTOCK.

See, also, Animals.

Transportation of,—see Railroads, 1-6.

MANDAMUS.

See, also, Bills of Exceptions, 2.

Controlling Judicial Action—When Rule Does not Apply.

1. *Mandamus* does not lie to control judicial action, but will run to compel the vacation of an order into the making of which judicial discretion could not enter, and which the court had no power to make.—State ex rel. Jones v. District Court, 1.

Nurses—Board of Examiners—Discretion.

2. The duty imposed by Chapter 50, Laws of 1913, upon the State Board of Examiners for Nurses to examine persons who seek registration as professional nurses and judge of their qualifications, is *quasi-judicial*, and its performance in any particular way cannot, therefore, be compelled by *mandamus*. Where, however, its discretion has been abused or arbitrarily or capriciously exercised, the writ does lie to compel a proper exercise of the powers granted.—State ex rel. Marshall v. District Court, 289.

Extent of Relief—Prayer.

3. Where a petitioner for a writ of mandate prays for something he is not entitled to, the court may nevertheless grant whatever mandatory writ might be appropriate under the petition and the proof.—State ex rel. Marshall v. District Court, 289.

State Lands—Leases—Sales—Discretion.

4. The question whether state lands lying within three miles of the limits of a city or town shall be leased or sold, being one addressed to the sound discretion of the state board of land commissioners, *mandamus* does not lie to compel such board to entertain an application to lease. State ex rel. Gibson v. Stewart, 404.

Same—Indispensable Parties.

5. Where a tract of state land had been sold and a certificate of sale issued, the purchaser was an indispensable party to a proceeding in *mandamus* to compel the state board of land commissioners to cancel such certificate and entertain an application to lease the land.—State ex rel. Gibson v. Stewart, 404.

MASTER AND SERVANT.

See Personal Injuries; Work and Labor; Contracts.

MECHANICS' AND MATERIALMEN'S LIENS.

Extend to What.

1. The lien given by section 7290, Revised Codes, to mechanics and materialmen, attaches primarily to the structure in the erection of which the labor or materials were used, and extends only incidentally to the land upon which it is situated.—Stritzel-Spaberg Lumber Co. v. Edwards, 49.

Removal of Structure—Right of Lienor.

2. A lumberman was not deprived of his lien upon a building for the erection of which he had furnished materials, by failure of title in the owner of the lot upon which it stood, prior to foreclosure; he was entitled to a decree foreclosing the lien, with the right to remove the building within the time allowed by law, whether injury to the realty resulted thereby or not.—Stritzel-Spaberg Lumber Co. v. Edwards, 49.

Statute—Liberal Construction.

3. After the necessary statutory steps toward securing a mechanic's or materialman's lien have once been taken, the lien law is subject to the most liberal construction.—Stritzel Spaberg Lumber Co. v. Edwards, 49.

MINES AND MINING CLAIMS.

Taxation—Constitution—Surface Ground.

1. Under section 2, Article XII, of the Constitution, and section 2500, Revised Codes, before the land embraced in a mining claim becomes subject to taxation at a valuation greater than the price paid the government therefor, the taxing officers must ascertain, and they have the burden of showing when their authority is questioned, that the surface ground, or some portion thereof, is used for other than mining purposes and has an independent value for such purpose.—*Barnard Realty Co. v. City of Butte*, 159.

Same—Surface Ground—Independent Value—Evidence—Insufficiency.

2. Evidence that land embraced in a mining claim, by reason of its location within the limits of a city had an independent value for town-site purposes, without a showing that it was being used for such a purpose; that streets and sewers had been extended over it and other improvements made thereon for the accommodation of adjoining property-holders, without the consent of the claim owner, however, who testified that it was his intention to work the property for the silver it was known to contain, was insufficient to warrant taxation of the land in excess of the limit prescribed in section 2, Article XII of the Constitution.—*Barnard Realty Co. v. City of Butte*, 159.

Illegal Taxation—Injunction—Proper Remedy.

3. Where the taxing authorities levy a tax not authorized by law, or upon property not subject to be taxed, their action is without jurisdiction and wholly void, and the remedy by injunction is available; in such a case it is not necessary that the owner first exhaust the remedy provided by amended section 2743, Revised Codes, (Laws 1909, Chap. 135), by appearing before the county board of equalization and making timely objection to the assessment.—*Barnard Realty Co. v. City of Butte*, 159.

“Cut”—Definition.

4. The word “cut” when used in conjunction with “shaft” and “drift,” held to mean a surface opening in the ground intersecting a vein.—*McLaughlin v. Bardsen*, 177.

MOOT CASES.

Dismissal,—see Appeal and Error, 14.

MORTGAGES.

Chattel Mortgages—Power of Sale.

1. Under section 5742, Revised Codes, providing that a power of sale may be conferred by a mortgage upon the mortgagee or any other person, the mortgagee may execute the power without calling upon the sheriff to make the sale, such officer not being given exclusive power.—*Kinsman v. Stanhope*, 41.

Cancellation—Party Plaintiff.

2. Where real estate is sold under a deed warranting title against encumbrances, the grantor may, after he has parted with title, maintain suit to have a mortgage, placed on record after he became the owner and of the existence of which he was unaware, canceled of record.—*Kersten v. Coleman*, 82.

Cancellation of Instruments—Decree.

3. Where plaintiff was justly entitled to a decree canceling a mortgage of record, the action of the court in designating the county clerk to cancel the instrument, instead of appointing a commissioner to do so, gave defendant no cause for complaint.—*Kersten v. Coleman*, 82.

Impairing Mortgage Security—Estoppel.

4. Where indorsers on a note knew of, and impliedly gave their assent to, sales of livestock mortgaged to secure it, they were estopped to insist that the mortgagee, by permitting the mortgagor to make the sales, had impaired the mortgage security and that they had been injured by the mortgagor's mismanagement and misappropriation of the proceeds.—*Columbus State Bank v. Erb*, 442.

MOTIONS.

Renewal,—see **Judgments**, 20-22.

MUNICIPAL CORPORATIONS.

See **Cities and Towns**; **Counties**.

NEGLIGENCE.

See **Animals**; **Personal Injuries**.

NEGOTIABLE INSTRUMENTS.

Indorsers permitting impairment of security,—see **Mortgages**, 4.

"Collateral Security"—Definition.

1. "Collateral security" means a pledge of personal property assigned or transferred and delivered by a debtor to a creditor as security for the payment of a debt or the fulfillment of an obligation.—*Averill Machinery Co. v. Bain*, 512.

Writings to be Construed Together.

2. An order for the payment of money and acceptance thereof executed contemporaneously and relating to the same transaction must be construed together.—*Averill Machinery Co. v. Bain*, 512.

Complaint—Insufficiency.

3. Where, in an action to enforce payment of collateral security, the complaint did not allege that at the time it was brought the whole or some part of the pledgor's indebtedness remained unpaid, it did not state a cause of action.—*Averill Machinery Co. v. Bain*, 512.

NEW TRIAL.

See, also, **Record on Appeal**.

Affirmance, When.

1. An order, general in terms, granting a motion for a new trial, the notice of intention to move for which specified all the statutory grounds, will not be disturbed on appeal where the record shows a sharp conflict in the evidence on the issue tried.—*Fadden v. Butte Miners' Union* No. 1, 104.

Hearing of motion—Authority of Substituted Judge.

2. Like the judge who heard the cause, a district judge called in to pass upon a motion for a new trial therein may, in the exercise of a sound discretion and judging from the printed record before him, disregard any testimony which he deems unsatisfactory or improperly received.—*In re Williams' Estate*, 142.

Appeal—Burden of Showing Error—Nominal Damages.

3. A new trial may not be granted merely for the purpose of allowing a party to recover nominal damages.—*Busbee v. Gagnon Co.*, 203.

Evidence—Insufficiency.

4. *Held*, in an action to recover for labor done, that a new trial was properly granted defendant, where the evidence failed to disclose

that he was the person at whose instance the services were performed by plaintiff.—*Gruelle v. J. I. Case T. M. Co.*, 214.

Hearing by Other Than Trial Judge.

5. The office of a district judge called in to determine a motion for a new trial in a cause heard by another judge was to decide whether the evidence as disclosed by the record, unaided by a recollection of the incidents of the trial, including a view of the witnesses, was sufficient to justify the verdict, and where the preponderance of the evidence thus viewed was decidedly against the conclusion reached by the jury, it was error to refuse a new trial.—*Waite v. Shoemaker Co.*, 264.

Notice of Motion—Sufficiency.

6. Though movant for a new trial may not, in the notice to his adversary state that he will pursue one of the methods authorized by section 6796, Revised Codes, and thereafter change to another, nor state two or more methods in the alternative, he may state them all conjunctively and thereafter abandon all but one, without laying his notice open to the charge of insufficiency.—*Doornbos v. Thomas*, 370.

Personal Injuries—Excessive Damages.

7. Held, that damages allowed a carpenter's helper, twenty-eight years of age, capable of earning \$1,000 per year, to the amount of \$15,000 after reduction by the court, on motion for new trial, from a verdict of \$25,000, for the loss of his right arm, where the jury were neither advised of his life expectancy nor the cost of an annuity equal to his earnings and were confined by the instructions to a consideration of the pain and suffering incident to the injury and the depreciation of his earning capacity, were so excessive as to evince passion or prejudice, and therefore to require a new trial.—*Chenoweth v. Great Northern Ry. Co.*, 481.

Nonconflicting Evidence—Duty of Judge Called in.

8. A district judge called in to determine a motion for a new trial asked for, among other grounds, because of the alleged insufficiency of the evidence to justify the findings of the trial judge, was required to determine, not whether the evidence was sufficient to warrant any particular finding, but whether the final conclusion, in view of the evidence in the printed record was justified.—*Milwaukee Land Co. v. Ruesink*, 489.

Insufficiency of Evidence—Affirmance of Order—When Proper.

9. Where, in an action for malpractice, the evidence preponderated decisively against the finding of the jury in favor of plaintiff, it was the duty of a district judge, called in to preside at the hearing of a motion for a new trial, to grant the same.—*Steiman v. The Murray Hospital*, 555.

NONAPPEALABLE ORDERS.

See Appeal and Error, 10.

NONSUIT.

Evidence of plaintiff, how viewed on appeal,—see Appeal and Error, 4.

NORTHERN PACIFIC LAND GRANT.

See Railroads, 9-12.

NOTICE.

See, also, Elections, 9-12; New Trial, 6.

Settlement of bill of exceptions,—see Bills of Exceptions, 3.

NOVATION.

Definition.

1. Novation results by the substitution of a new obligation for another, with intent to extinguish the old one.—*Kinsman v. Stanhope*, 41.

What Does not Constitute.

2. *Held*, under the rule above, that where plaintiff purchased an automobile from defendant giving a chattel mortgage to secure the unpaid purchase money, a subsequent agreement that plaintiff should run the automobile for hire and turn over to defendant all moneys received until the balance due on the purchase price should be fully paid, did not work a novation.—*Kinsman v. Stanhope*, 41.

NURSES.

Registration—Regulation of Profession—Due Process of Law.

1. *Held*, that Chapter 50, Laws of 1913, requiring registration of professional nurses, is not unconstitutional as depriving, without due process of law, nurses not registered of the right to follow a lawful business or calling, since the Act expressly provides that it does not apply to gratuitous nursing nor to any person nursing for hire who does not pretend to have special training and to be a registered nurse.—*State ex rel. Marshall v. District Court*, 289.

Regulation—Administrative Agencies.

2. The process of administration of the provisions of an Act regulating a profession or calling may be committed to any agency the legislature chooses to select, *i. e.*, to individuals, corporations or voluntary associations; hence the fact that the State Association of Graduated Nurses, to which an appeal may be taken from the decision of the State Board of Nurse Examiners refusing to recommend registration, is a voluntary association, does not render that section objectionable.—*State ex rel. Marshall v. District Court*, 289.

Same—Appeal Procedure.

3. In the absence of provisions prescribing the procedure on appeal from a decision of the State Board of Examiners for Nurses, Chapter 50, *supra*, implies such orderly procedure as will enable the appellate body to fairly determine the right of appellant to registration.—*State ex rel. Marshall v. District Court*, 289.

OFFICE AND OFFICERS.

See, also, Elections, 4; Sureties, 1.

Public officers—Personal liability on contracts of employment,—see Contracts, 7, 8.

Offices—When Incompatible.

1. Offices are incompatible when the incumbent of one has power of removal over the other, or when one has power of supervision over the other, or when the nature and duties of the two render it improper, from considerations of public policy, for one person to retain both.—*State ex rel. Klick v. Wittmer*, 22.

Vacancy—Implied Resignation.

2. As to an office which the incumbent may vacate by his own act, a resignation impliedly occurs upon his acceptance of another office incompatible therewith.—*State ex rel. Klick v. Wittmer*, 22.

Creation—Vacancies.

3. Upon the creation of an additional judgeship in a judicial district, a vacancy existed until filled by appointment by the governor,

section 420, Revised Codes, enumerating the instances when vacancies occur, not being exclusive.—State ex rel. Patterson v. Lentz, 322.

Same—Power to Appoint—Length of Term—Constitution.

4. An Act creating an additional district judgeship without provision touching the length of the term or expressly authorizing the appointment is sufficient warrant for the governor in making it, in the absence of expression therein importing futurity of selection; so likewise an expressed intention to authorize an appointment for a term longer than that contemplated by the Constitution is ineffective.—State ex rel. Patterson v. Lentz, 322.

Length of Term—Constitution—Power of Legislature.

5. An Act authorizing an appointment to office for a term longer than that contemplated by the Constitution is ineffective.—State ex rel. Patterson v. Lentz, 322.

District Judges—Appointment—Length of Term.

6. *Held*, under the constitutional and statutory provisions applicable, that a district judge appointed to fill a vacancy brought about by the creation of an additional judgeship, could serve only until the next general election in point of time, and until his successor was elected and qualified, and not until the next election at which the district judges generally were to be selected.—State ex rel. Patterson v. Lentz, 322.

Election and Appointment—Public Policy.

7. The general policy of the state government is that election to office, when it may be conveniently done, is the rule, and that appointments to fill vacancies shall be effective only until the people can elect.—State ex rel. Patterson v. Lentz, 322.

OFFICIAL BONDS.

See Sureties, 1.

OPTIONS.

See Real Property, 1, 2.

PARDONS.

Effect.

1. By applying for and obtaining a pardon, an attorney convicted of crime will be held to have acquiesced in the judgment of conviction.—In re Sutton, 88.

Unconditional and Conditional Pardon—Effect.

2. While an unconditional pardon may be said to have the effect of canceling the judgment of conviction for crime, thus relieving the offender of the consequences of his act, a conditional one has no such effect.—In re Sutton, 88.

Conditional Pardon—Violation of Condition—Effect.

3. One convicted of crime who transgresses any of the restraints placed upon him by a conditional pardon occupies the position of an escaped convict.—In re Sutton, 88.

Acceptance—Effect.

4. A conditional pardon is in the nature of a deed, and must be accepted; after acceptance, all conditions, which may lawfully be imposed upon the convict are binding upon him.—In re Sutton, 88.

PART PAYMENT.

Recovery back,—see Real Property, 5, 6.

PARTIES.

Plaintiff—Cancellation of mortgage,—see Mortgages, 2.
 Right to disqualify district judges,—see District Courts, 3.
 Within meaning of fair trial law,—see District Courts, 12.

Receivers.

1. A receiver does not by virtue of his appointment become a party to the action in which, as a matter of ancillary relief, he was appointed.—State ex rel. First T. & S. Bank v. District Court, 259.

State Lands—Certificate of Purchase—Cancellation—Indispensable Parties.

2. Where a tract of state land had been sold and a certificate of sale issued, the purchaser was an indispensable party to a proceeding in *mandamus* to compel the state board of land commissioners to cancel such certificate and entertain an application to lease the land.—State ex rel. Gibson v. Stewart, 404.

Trial—Peremptory Challenges—"Each Party"—Definition.

3. The provision of section 6740, Revised Codes, that "each party" to a civil action shall be entitled to four peremptory challenges, *held* to mean each side or party litigant, and not each person of whom the respective sides or parties litigant are made up.—Mullery v. Great Northern Ry. Co., 408.

PARTNERSHIP.

See, also, Receivers, 7.

"Transacting Business" Under Fictitious Name—What Does not Constitute.

1. K., a nonresident, purchased cattle in Montana, signing the name of "K. Bros." to the contract, although there was no such firm and he had never done business under that designation before, its use in this instance having been occasioned through carelessness, inadvertence or the lack of appreciation of its effect, and the fact that he and his brother, formerly residing together, were sometimes referred to as "K. Brothers." Section 5509, Revised Codes, provides that an individual who transacts business in a firm name must file the certificate prescribed therein. Such certificate had not been filed. *Held*, that the execution of the contract in this isolated instance, in the above circumstances, did not constitute "transacting business," so as to defeat K.'s right to sue on the contract under the penalty prescribed by the section.—Keffler v. Wilds, 381.

Contract—Assignment—Right of Partner.

2. Where a firm was the owner of a right to have title to realty conferred to it, one of its members could rightfully make an assignment thereof while the partnership was in existence; if in process of liquidation, the assignment was good also, under section 5502; and if not authorized to act as liquidating partner, it was valid where the assignee paid value relying upon the credit of the firm and the consideration was devoted to its benefit.—Milwaukee Land Co. v. Ruesink, 489.

PERSONAL INJURIES.

Railroads—Children—Boarding Moving Trains—Fencing Tracks—Statutes—Complaint—Insufficiency.

1. Complaint in an action for damages for the death of a child, alleged to have been the result of the negligent failure of the defendant company to maintain a fence along its track, as it was its duty to do under section 4308, Revised Codes, *held* insufficient to state a cause of action under such statute, the enactment of which was for the benefit

of owners of livestock, and not to make railway companies liable for injuries to children.—*Nixon v. Montana, Wyo. & S. W. Ry. Co.*, 95.

Same—Turntable Doctrine—Complaint—Insufficiency.

2. Complaint further *held* insufficient to state a cause of action under the turntable doctrine, where the only allegation touching the unusually alluring character of the thing by reason of which the child was impliedly invited upon defendant company's track, was that a slowly moving train, in which two cars had been placed behind the caboose, thus made up and so moving, was attractive to children, *etc.*—*Nixon v. Montana, Wyo. & S. W. Ry. Co.*, 95.

Same—Injuries on Tracks—Implied Invitation—Custom.

3. A railway company which permits the use of its tracks as a highway by school children must expect their presence and operate its trains accordingly; its implied invitation in this regard, however, does not carry with it a license to use them to board its freight trains or for any other purpose.—*Nixon v. Montana, Wyo. & S. W. Ry. Co.*, 95.

Same—Boarding Moving Trains—Implied Invitation.

4. *Quære*: May an invitation by a railway company to children to board moving freight trains be implied from toleration of previous attempts so to do?—*Nixon v. Montana, Wyo. & S. W. Ry. Co.*, 95.

Cities and Towns—Statutes—Excavations.

5. *Held*, that section 8535, Revised Codes, making it obligatory on persons sinking shafts or running drifts or cuts within the corporate limits of a city, *etc.*, to properly guard the same under a heavy penalty for failure to do so, has no application to a ditch or trench temporarily opened for the purpose of laying sewer-pipe.—*McLaughlin v. Bardsen*, 177.

Same—Ordinances—"Excavations"—Definition.

6. An ordinance making it unlawful to permit any "shaft, drift or prospect hole or other excavation" to remain unguarded within the limits of a city where mining is the principal industry, *held* not to be susceptible of application to a trench dug for sewer-pipe purpose, the words "or other excavation," under the rule of *ejusdem generis* or *nosctitur a sociis*, being referable to an excavation made in the course of prospecting or active mining.—*McLaughlin v. Bardsen*, 177.

Duty of Owner Toward Trespasser—Common-law Liability.

7. At common law the land owner is required merely to refrain from any intentional or wanton acts occasioning injury to a trespasser upon his property.—*McLaughlin v. Bardsen*, 177.

Who Deemed Owner.

8. Persons in possession of land under an easement must be treated as the owners for the purpose of determining whether they owed any duty to one who sustained personal injuries while upon the premises.—*McLaughlin v. Bardsen*, 177.

Negligence of Owner—Wantonness—What may Constitute.

9. Wantonness on the part of a land owner causing injury to a trespasser may be shown by acts of omission as well as by acts of commission, where the facts disclose a reckless disregard of the lives or safety of others.—*McLaughlin v. Bardsen*, 177.

Negligence of Land Owner—Wantonness—Evidence—Nonsuit—Error.

10. Evidence of plaintiff *held* to have made out a *prima facie* case of common-law liability on the part of defendant contractors, because of their reckless disregard of the lives and safety of others, it being shown that they dug a deep trench across a well-defined path over uninclosed land which had been used by the public for several years in going to and coming from their homes, defendants leaving the excavation un-

guarded and unprotected for a period covering two or three weeks, as a consequence of which negligence plaintiff, not knowing of the existence of the trench, fell into it in the night-time and was injured; hence the court erred in granting a nonsuit.—*McLaughlin v. Bardsen*, 177.

Master and Servant—Contributory Negligence—Evidence—Insufficiency.

11. Evidence in an action to recover damages for the death of a laborer killed by the caving in of a trench, *held* not to show contributory negligence on the part of deceased so clearly as to show that, in returning a general verdict in favor of plaintiff, the jury must have acted arbitrarily, justifying a reversal of the judgment.—*Comerford v. James Kennedy Construction Co.*, 196.

Same—Contributory Negligence—Burden of Proof.

12. The burden of proving that a servant's negligence contributed to his injury is upon the master.—*Comerford v. James Kennedy Construction Co.*, 196.

Negligence—Failure of Proof—Nonsuit.

13. In an action for damages for personal injuries sustained in a runaway alleged to have been caused by defendant's negligence in driving an automobile toward plaintiff after discovering that his horse had become frightened, in failing to turn out of the road, and in causing or permitting the machine to make very loud and unusual noises, a nonsuit was properly granted where plaintiff's own evidence showed that the horse was well broken and accustomed to automobiles, and where no evidence was offered that the noises from the automobile were caused by any act of defendant or that, by the exercise of the highest possible degree of care, they could have been prevented.—*Day v. Kelly*, 306.

Pleading—Contributory Negligence—Admissions.

14. Where, in a personal injury action, the answer contains a general or specific denial of the allegations of negligence stated in the complaint, the affirmative plea that plaintiff was guilty of contributory negligence does not confess the truth of the acts of negligence set forth in the complaint, on the theory that contributory negligence presupposes negligence on the part of defendant.—*Day v. Kelly*, 306; *Nelson v. Northern Pac. Ry. Co.*, 516.

Railroads—Tracks upon Premises of Another—Care Required.

15. The rule that railway companies must, in the operation of their engines and cars, exercise ordinary care to avoid injury to persons whose rightful presence upon or near their tracks is to be anticipated, has especial application to cases where the tracks are upon premises and within structures belonging to the employer of the injured.—*Mullery v. Great Northern Ry. Co.*, 408.

Positive and Negative Testimony—Weight—Jury Question.

16. The conflict presented by the positive testimony of defendant company's train crew that the bell of its locomotive was ringing at the time of the accident, and the negative statements of plaintiff and his witnesses that they heard no bell, was one properly submitted to the jury for solution.—*Mullery v. Great Northern Ry. Co.*, 408.

Codefendants—Verdict as to One—Effect.

17. Where the complaint in a personal injury action charged the defendant railway company with primary negligence as well as with responsibility for the failure of its switching crew—two members of which only were made defendants—to exercise care in making a coupling and to ring the bell of the locomotive, and the jury found against all, though the evidence did not connect the individual defendants with the cause of the injury, a reversal of the judgment as to them did not necessitate the same result as to the company.—*Mullery v. Great Northern Ry. Co.*, 408.

Master and Servant—Assumption of Risk—Appreciation of Danger.

18. Where recovery of damages for personal injuries is sought to be defeated because plaintiff, with full knowledge and appreciation of the danger of his situation did not exercise any care for his safety, the danger appreciated must be the one from which the injury arose.—*Mullery v. Great Northern Ry. Co.*, 408.

Contributory Negligence.

19. An employee who, while in the discharge of his duties, was injured by a sudden and unexpected movement of cars which had been standing on a track upon his employer's premises, without an engine attached, and of any contemplated movement of which he was entitled to be warned but was not, and who before stepping into the place where he was hurt stopped, looked and listened, may not be said to have been guilty of negligence as matter of law.—*Mullery v. Great Northern Ry. Co.*, 408.

Evidence—Admissions—Jury Question.

20. Whether immediately after the accident plaintiff made statements that his injury was due to his own carelessness—of which he disclaimed any recollection—whether, when made, he was fully conscious of their purport, and whether their purport constituted an admission of legal negligence, were questions for determination by the jury.—*Mullery v. Great Northern Ry. Co.*, 408.

Contributory Negligence—Choice of Ways.

21. In applying the rule that contributory negligence will be imputed, as a matter of law, to an employee who, in the performance of a duty, knowingly and voluntarily chooses a way which is dangerous in preference to one which is safe, or one which is more dangerous than the one he selects, regard must be had to the circumstances and the right of the chooser to assume that others whose negligence may jeopardize his safety will proceed in the customary manner and with reasonable care.—*Mullery v. Great Northern Ry. Co.*, 408.

Choice of Ways.

22. In balancing ways for the purpose of making a choice, the rule requires only such a choice as under all the known or obvious circumstances a reasonably prudent person might make, and not an unerring one viewed in the light of after-events.—*Mullery v. Great Northern Ry. Co.*, 408.

Earning Capacity—Evidence—Admissibility.

23. Where plaintiff, by trade a carpenter, was injured while working in a smelter, he was not, in showing his earning capacity, confined to his then occupation as a standard, but was properly allowed to introduce evidence that the going wage of carpenters at the place of the accident was \$1.75 per day more than he was receiving at the time of its occurrence.—*Mullery v. Great Northern Ry. Co.*, 408.

Same—Proper Instruction.

24. An instruction authorizing the jury to consider plaintiff's disability, if any, to pursue his usual vocation, in addition to the impairment of his earning capacity, in arriving at their verdict, held not open to objection.—*Mullery v. Great Northern Ry. Co.*, 408.

Verdict not Excessive.

25. Plaintiff was earning \$3.25 per day when hurt, his injuries consisted of a scalp wound, the loss of two fingers of his right hand, and the crushing of a third, the fracture of a bone of the thumb of the left hand, inside of which a growth is developing; he was unable to work for four months, has lost his earning capacity as a carpenter and an all-around man, suffered pain and sustained a permanent mutilation.

Held, that a verdict for \$5,000 was not excessive.—*Mullery v. Great Northern Ry. Co.*, 408.

Codefendants—Contribution.

26. As between codefendants charged with negligence in which both participated, resulting in personal injuries to plaintiff, the doctrine of contribution does not apply in favor of the one against who judgment was rendered.—*Chenoweth v. Great Northern Ry. Co.*, 481.

Same—Dismissal as to One—Parties—Notice of Appeal—Service.

27. After dismissal of one of two defendants on motion for nonsuit, the defendant so dismissed was no longer a party to the action, and service of notice of appeal upon it by the other defendant was unnecessary.—*Chenoweth v. Great Northern Ry. Co.*, 481.

Same—Peremptory Challenges.

28. Under *Mullery v. Gt. Northern Ry. Co.*, *supra*, the contention that each of two corporation defendants in a personal injury action was entitled to four peremptory challenges of jurors *held* without merit. *Chenoweth v. Great Northern Ry. Co.*, 481.

Excessive Damages—New Trial.

29. *Held*, that damages allowed a carpenter's helper, twenty-eight years of age, capable of earning \$1,000 per year, to the amount of \$15,000 after reduction by the court, on motion for new trial, from a verdict of \$25,000, for the loss of his right arm, where the jury were neither advised of his life expectancy nor the cost of an annuity equal to his earnings, and were confined by the instructions to a consideration of the pain and suffering incident to the injury and the depreciation of his earning capacity, were so excessive as to evince passion or prejudice, and therefore to require a new trial.—*Chenoweth v. Great Northern Ry. Co.*, 481.

Same.

30. In determining whether a verdict is so excessive as to show passion or prejudice on the part of the jurors, the time devoted to the consideration of the case by them, though not decisive, may be taken into account.—*Chenoweth v. Great Northern Ry. Co.*, 481.

Negligence—Proximate Cause—Pleading and Proof.

31. In a personal injury action by an employee against his employer, whether based upon a breach of duty expressly enjoined by statute or upon a violation by the latter of his common-law duty, the plaintiff must allege facts and circumstances disclosing a breach of duty, and establish by his evidence that such breach was the proximate cause of his injury.—*Nelson v. Northern Pacific Ry. Co.*, 516.

Railroads—Warning Signals—Duty of Employer.

32. Employees of railway companies come within the protection of the rule that signals must be given of the approach of trains to warn persons on the track or in dangerous proximity thereto. Failure to observe the precaution when ordinary prudence and diligence require it is evidence of negligence. Where the statute enjoins the duty to warn, failure to obey its mandate is negligence *per se*.—*Nelson v. Northern Pacific Ry. Co.*, 516.

Same—Warning Signals—Extent of Duty.

33. While in the open country and at a distance from public crossings, where the view is unobstructed, and the train is on time, the duty to give precautionary signals may be relaxed or entirely dispensed with, even though a section crew is known to be ahead on the track—the members thereof being presumed to guard themselves against danger—warning of the approach of the train must be given, where the view is obstructed and the train is not running on schedule time.—*Nelson v. Northern Pacific Ry. Co.*, 516.

Same—Proximate Cause—Evidence—Insufficiency.

34. Alleged negligence on the part of defendant company's locomotive engineer in failing to give warning of the approach of his train, *held* not to have been a proximate cause of plaintiff's injury, the evidence disclosing that the latter observed the approach of the train in ample time to get out of danger's way.—Nelson v. Northern Pacific Ry. Co., 516.

Same—Railroads—Excessive Speed of Train—Negligence.

35. The movement of a passenger train at a higher rate of speed than that allowed by the schedule is not negligence *per se*; hence where a section foreman alleged excessive speed as an element of negligence resulting in the collision in which he was injured, and testified that the train was running at a speed of from fifty to sixty miles an hour, but omitted to show that the engineer did not use every facility at his command to check the speed upon observing plaintiff, or that because of the speed maintained he could not have avoided the collision, he failed to make out a *prima facie* case of negligence in this respect and was properly nonsuited.—Nelson v. Northern Pacific Ry. Co., 516.

Same—Employer's Liability—Federal Act—Contributory Negligence.

36. In an action for personal injuries brought under the Federal Employer's Liability Act, a plea of contributory negligence is not available in any case, except to diminish the amount of damages, and may not be interposed for any purpose in cases in which the violation of a statute enacted for the safety of employees has contributed to the injury.—Nelson v. Northern Pacific Ry. Co., 516.

Same—Contributory Negligence—Plea not Admission of Negligence.

37. A plea of contributory negligence, when coupled with a denial, involves merely a hypothetical admission for the purpose of the plea, and does not relieve the plaintiff of the burden of proving negligence on the part of the defendant in some one or more of the particulars alleged in the complaint.—Nelson v. Northern Pacific Ry. Co., 516.

Negligence—Proof.

38. An inference of negligence may not be drawn from the bare occurrence of an injury.—Lyon v. Chicago, M. & St. P. Ry. Co., 532.

PLEADING AND PRACTICE.

See, also, Variance.

Railroads—Children—Boarding Moving Trains—Fencing Tracks—Statutes—Complaint—Insufficiency.

1. Complaint in an action for damages for the death of a child alleged to have been the result of the negligent failure of the defendant company to maintain a fence along its track, as it was its duty to do under section 4380, Revised Codes, *held* insufficient to state a cause of action under such statute, the enactment of which was for benefit of owners of livestock, and not to make railway companies liable for injuries to children.—Nixon v. Montana, Wyo. & S. W. Ry. Co., 95.

Same—Turntable Doctrine—Complaint—Insufficiency.

2. Complaint further *held* insufficient to state a cause of action under the turntable doctrine, where the only allegation touching the unusually alluring character of the thing by reason of which the child was impliedly invited upon defendant company's track, was that a slowly moving train, in which two cars had been placed behind the caboose, thus made up and so moving, was attractive to children, *etc.*—Nixon v. Montana, Wyo. & S. W. Ry. Co., 95.

Cancellation—Tender of Deed—Failure to Allege—When Immaterial.

3. Where plaintiff, in an action to cancel a contract of sale of land, tendered a deed at the trial, and defendant failed to make payment of the balance due on the purchase price, the latter was in no position to claim error because of plaintiff's omission to allege in its complaint that demand upon defendant for payment was accompanied by a deed.—*Suburban Homes Co. v. North*, 108.

Same—Restoration of Part Payment—Complaint.

4. A vendor seeking the aid of a court of equity to have a contract of sale of land canceled as a cloud upon his title, it having been breached by the purchaser by his failure to make payment of installments as they fell due, need not, as he would be compelled to do in an action to rescind, allege in his complaint that he has restored, or offered to restore, partial payments theretofore made.—*Suburban Homes Co. v. North*, 108.

Pleadings—When not Amendable.

5. A pleading which in legal effect is a nullity is incapable of amendment.—*State ex rel. Smith v. District Court*, 134.

Trial—Reopening Case—Discretion.

6. The refusal of an offer of proof made, upon a motion to reopen the hearing, after the cause had been taken under advisement was a matter addressed to the discretion of the trial court.—*In re Williams' Estate*, 142.

Counterclaims—Splitting Causes of Action—Effect.

7. Where defendant, instead of including in one counterclaim damages which were one of the natural consequences of delay resulting from plaintiff's failure to deliver brick as required, split his cause of action into two counterclaims and recovered on the first, he was not entitled to even nominal damages on the second.—*Busbee v. Gagnon Co.*, 203.

Pleading—Entirety of Contract—Estoppel.

8. Plaintiff having pleaded the contract of employment as an entirety could not thereafter assert that part of it was with the state at a certain wage per day, and the other part with defendant personally on a commission basis.—*Rood v. Murray*, 240.

Office of Reply.

9. The reply is only responsive to matters alleged affirmatively in the answer and cannot perform the office of amending the complaint or become the basis of recovery.—*Waite v. Shoemaker & Co.*, 264.

Theory of Case.

10. A party, when bringing an action, must so frame his pleadings as to present some definite and certain theory upon which he predicates his prayer for relief: on appeal he will be held bound by the position thus assumed in the trial court, even though it be an erroneous one.—*Waite v. Shoemaker & Co.*, 264; *Columbus State Bank v. Erb*, 442.

Pleading—Inconsistent Defenses.

11. A defendant may plead inconsistent defenses, so long as the inconsistency is not so marked that, if the facts stated in one be true, those stated in the other must of necessity be false.—*Day v. Kelly*, 306.

Pleading—Contributory Negligence—Admissions.

12. Where, in a personal injury action, the answer contains a general or specific denial of the allegations of negligence stated in the complaint, the affirmative plea that plaintiff was guilty of contributory negligence does not confess the truth of the acts of negligence set forth in the complaint, on the theory that contributory negligence presupposes negligence on the part of defendant.—*Day v. Kelly*, 306; *Nelson v. Northern Pac. Ry. Co.*, 516.

Reply—Departure.

13. The reply cannot be looked to to aid the cause of action alleged in the complaint; hence, where plaintiff in his complaint relied for recovery on a breach of warranty and in his reply upon a subsequent undertaking of defendant with reference to the article sold, there was such a departure in pleading as to defeat recovery on the cause thus alleged.—*Doornbos v. Thomas*, 370.

Complaint—Ambiguity—Failure to Demur—Waiver.

14. Failure to demur to a complaint for ambiguity operates as a waiver of such defect, under section 6539, Revised Codes.—*Keffler v. Wilds*, 387.

Motions—Renewal—Practice.

15. While it is the better practice to have the order denying a motion to vacate a default recite that it is made without prejudice or that permission is granted to renew the motion, yet where neither course is pursued and the renewed motion has been heard and disposed of upon its merits, it will be presumed that leave was previously granted.—*State ex rel. Working v. District Court*, 435.

Laches—Complaint.

16. A mere delay in commencing suit, short of the period of limitation, need not be excused in the complaint.—*Brundy v. Canby*, 454.

Inconsistent Pleadings—Rule.

17. To make pleadings objectionable as inconsistent they must be so far contradictory that if the allegations supporting one theory are true, those supporting the other must of necessity be false.—*Chenoweth v. Great Northern Ry. Co.*, 481.

Collateral Security—Complaint—Insufficiency.

18. Where, in an action to enforce payment of collateral security, the complaint did not allege that at the time it was brought the whole or some part of the pledgor's indebtedness remained unpaid, it did not state a cause of action.—*Averill Machinery Co. v. Bain*, 512.

Indebtedness—Insufficient Allegation.

19. An allegation that pledgor was indebted to the pledgee in the month of June, 1910, was insufficient to disclose an indebtedness in November of the year following, when the action was commenced.—*Averill Machinery Co. v. Bain*, 512.

Libel—Pleadings.

20. Plaintiff in an action for libel can recover only, if at all, for the publication of the particular matter referred to in the complaint. Words not pleaded, though published at the same time, cannot be relied on.—*Lemmer v. The "Tribune,"* 559.

Same—General Damages—Language Must be Libelous *Per Se*.

21. To state a cause of action for general damages for libel, the language complained of must be libelous *per se*; i. e., such as, without the aid of innuendo, imputes to plaintiff the commission of a crime or necessarily exposes him to hatred, contempt, ridicule or obloquy.—*Lemmer v. The "Tribune,"* 559.

Same—Special Damages—Complaint—Insufficiency.

22. Where special damages are sought for a libelous publication, the facts showing such damages must be alleged; hence a general allegation that plaintiff was damaged in his business in consequence of the publication of the article referred to above was insufficient in this respect.—*Lemmer v. The "Tribune,"* 559.

PLEDGES.

Rights of Parties.

1. The legal title to property pledged remains in the pledgor; the lien the pledgee has upon it depends for its validity upon his possession; and when the principal debt is paid, the pledge is discharged and the pledgor is entitled to a return of the property pledged.—*Averill Machinery Co. v. Bain*, 512.

Indebtedness—Insufficient Allegation.

2. An allegation that pledgor was indebted to the pledgee in the month of June, 1910, was insufficient to disclose an indebtedness in November of the year following, when the action was commenced.—*Averill Machinery Co. v. Bain*, 512.

PRESUMPTIONS.

Appeal—Burden of Showing Error.

1. The burden of overcoming the presumption that a ruling appealed from is correct is upon appellant.—*Wherry v. Sprinkle*, 191.

Default Judgment—Vacation—Grounds.

2. Where, on a motion to vacate a default judgment, there was no showing whatever of excusable neglect or of the existence of any meritorious defense, it must be assumed that the order vacating the judgment was not made on discretionary grounds.—*Beller v. Le Boeuf*, 192.

Habeas Corpus—Pleadings.

3. Though one under punishment for a direct contempt cannot, on *habeas corpus*, deny the facts stated in the order adjudging him guilty, no presumptions or intendments are to be indulged against him.—*In re Mettler*, 299.

General and Special Elections—Notice.

4. Though the electors are presumed to know what offices are usually to be filled at a general election, they cannot be presumed to know the fact that a special election is to be held to fill an office for an unexpired term.—*State ex rel. Patterson v. Lertz*, 322.

Laches.

5. Though laches may arise from an unexplained delay short of the period fixed by the statute of limitations, it will not be presumed from such a delay alone; unless it is made to appear affirmatively that unusual circumstances exist which, on account of such delay, render the proceeding inequitable, relief cannot be denied.—*Brundy v. Canby*, 454.

PRINCIPAL AND AGENT.

See *Contracts*, 7, 8.

PROBATE PROCEEDINGS.

Wills—Contests—Witnesses—Interest.

1. While the fees to accrue to an executor (a witness to the execution of a will, though not a subscribing one) may be said to constitute an interest to be considered in weighing the testimony in a will contest, in contemplation of law they are no more than compensation for services, and cannot be denominated a "legacy," or a "devise," or a "beneficial gift," within the meaning of section 4732, Revised Codes, so as to disqualify him for interest.—*In re Williams' Estate*, 142.

Same—Subscribing Witnesses—Testimony not Conclusive.

2. The testimony of the attesting witnesses to a will is open to contradiction.—*In re Williams' Estate*, 142.

Same—Subscribing Witnesses—Admissibility of Evidence.

3. Where the attesting witnesses to a will are present in the county, they must, under Rev. Codes, sec. 7400, in a contest, be called and examined, and other testimony to prove the will cannot be received to the exclusion of theirs. Where, however, one is absent and his deposition is introduced, evidence of one not an attesting witness may properly be received to supplement the testimony of the subscribing witness who is present at the hearing.—In re Williams' Estate, 142.

Same—Publication by Testator—What Sufficient and What Insufficient.

4. Under section 4726, Revised Codes, the attesting witnesses to a will must, at the time they attest, be informed in some way (though not necessarily in words) by the testator himself that the instrument he has subscribed is his will; knowledge of this fact derived from any other source or at any other time being insufficient.—In re Williams' Estate, 142.

Same—Publication—Insufficiency of Evidence.

5. Evidence in a will contest *held* to show that the requirement of section 4726, Revised Codes, relative to publication of her will to the subscribing witnesses by the testatrix was not observed.—In re Williams' Estate, 142.

Same.

6. Where both subscribing witnesses to a will testified that testatrix did not publish to them the fact that the instrument was her will, the subsequent impeachment of only one of them was ineffectual to establish the will.—In re Williams' Estate, 142.

Same.

7. Where neither of the subscribing witnesses read the attesting clause, and both agreed that when the paper was handed to them for signature, it was so folded that they did not see that portion of it which stated that it was signed, published and declared by testatrix, *etc.*, the contention that the recitals of the clause showed that the requirements of the law had been met was unavailing.—In re Williams' Estate, 142.

Same—Evidence—Inadmissibility.

8. Evidence of a conversation between the two subscribing witnesses to a will mentioned above, in which one was said to have told the other that testatrix had stated to him at the time they signed it that the instrument was her will, was inadmissible in proponents' case in chief, as well as in rebuttal where no foundation had been laid.—In re Williams' Estate, 142.

Same—Probate—Contest—Burden of Proof.

9. Upon the trial of the issues tendered by the contestant of a will on probate thereof and joined by the answer of the proponent, the burden of proof rests upon the former.—In re Williams' Estate, 142.

Same—Subscribing Witnesses—Interest—Evidence—Admissibility.

10. A letter written by one of the subscribing witnesses after his deposition, which was introduced at the trial, had been taken, detailing his testimony, in which he emphasized portions by underscoring, was properly admitted as showing a state of mind properly to be considered in weighing his testimony.—In re Williams' Estate, 142.

PROHIBITION.

Remedy by Appeal—"Speedy and Adequate."

1. Where immediate injury or mischief might follow an attempt to exercise the right of appeal in a proceeding in which the district court, in alleged excess of jurisdiction, is about to enter a decree awarding a peremptory writ of mandate, the remedy is neither so speedy nor adequate as to bar the granting of a writ of prohibition under section 7228, Revised Codes.—State ex rel. Marshall v. District Court, 289.

PROMISSORY NOTES.

See Negotiable Instruments.

PUBLIC LANDS.

See State Lands; Taxation, 1-4.

PUBLIC OFFICERS.

See, also, Office and Officers.

Personal liability on contracts of employment,—see Contracts, 7, 8.

PUBLIC POLICY.

Officers—Election and Appointment.

1. The general policy of the state government is that election to office, when it may be conveniently done, is the rule, and that appointments to fill vacancies shall be effective only until the people can elect.—State ex rel. Patterson v. Lentz, 322.

QUANTUM MERUIT.

See Contracts, 10-13.

RAILROADS.

See, also, Personal Injuries, 1-5, 15-37.

Transportation of Livestock—Delay—Common-law Duties—Special Contract—Variance.

1. Under *Nelson v. Great Northern Ry. Co.*, 28 Mont. 297, 72 Pac. 642, a shipper of livestock may maintain an action against the carrier for a breach of its common-law duty to transport the cattle to their destination without unreasonable delay, and is not bound to sue as for a violation of the contract of carriage entered into between the parties; hence the contention, that by thus pleading a tort and proving a breach of the contract a fatal variance resulted, has no merit.—*Wall v. Northern Pacific Ry. Co.*, 122.

Common-law Duties—Limitation by Special Contract—Reasonableness.

2. A common carrier may by special contract limit its common-law liability, provided the terms thereof are reasonable; whether they are reasonable depends upon the facts and circumstances of the particular case.—*Wall v. Northern Pacific Ry. Co.*, 122.

Liability—Special Contract—Burden of Proof.

3. Where a common carrier relies upon a special contract to escape liability for a breach of its common-law duty, it must plead and bear the burden of establishing it.—*Wall v. Northern Pacific Ry. Co.*, 122.

Limitation of Common-law Duty—Unreasonableness.

4. Where a common carrier contracted to transport livestock to a point beyond its own line, a provision that the shipper, as a condition precedent to his right to recover damages for loss or injury to any of the stock, must give notice of his claim in writing to some officer or station agent of the company before the stock had been removed from the place of destination or mingled with other stock, was void for unreasonableness, and therefore not binding upon the shipper in the absence of proof that the initial carrier had an officer or agent at the place of destination to whom such notice might be given.—*Wall v. Northern Pacific Ry. Co.*, 122.

Cause of Delay—Burden of Proof.

5. Since the movements of defendant's train carrying the plaintiff's cattle were exclusively under its own management and control, and the

facts which caused the train to be delayed were peculiarly within the knowledge of its officers and agents, the burden was upon it to show that the delay complained of arose from some other cause than its own negligence.—Wall v. Northern Pacific Ry. Co., 122.

Same.

6. Upon showing that defendant carrier consumed substantially thirteen days in delivering his cattle at the place of destination over a route usually covered in six or seven days, plaintiff had made a *prima facie* case of negligence on the part of defendant, and was not bound to show that every delay along the route was caused by the negligence of defendant.—Wall v. Northern Pacific Ry. Co., 122.

Arrival of Trains—Posting Notice—Statutory Requirements.

7. *Quære*: Was Chapter 105, Laws of 1909, page 145, requiring railway companies to post notices at stations along its line of the arrival of passenger trains, enacted for the protection of employees as well as for the convenience of the public, and may a violation of such Act be alleged as negligence in an action for personal injuries by a railway employee, brought under the Federal Employers' Liability Act (Chap. 149, 35 Stat. 64)?—Nelson v. Northern Pacific Ry. Co., 516.

Washing Away of Embankment—Negligence—Burden of Proof.

8. An inference of negligence may not be drawn from the bare occurrence of an injury in any case; hence the contention, in an action against a railway company for damages incident to the giving way of an embankment alleged to have been negligently constructed, that the mere washing away of the embankment made out a *prima facie* case of negligence against defendant, and that the burden then shifted to it, was without merit.—Lyon v. Chicago, M. & St. P. Ry. Co., 532.

Grant of Right of Way—Extent of Grant.

9. The grant of land to the Northern Pacific Railroad company for right of way purposes took effect at the time the Act was approved; the title conveyed by it dates from that time; the rights conferred upon the company, its successors and assigns, are subject to no conditions save those expressed or necessarily implied; it was founded on valuable considerations and should receive a more liberal construction, in favor of the purposes for which it was made, than a more private grant.—Smith v. Northern Pacific Ry. Co., 539.

Same.

10. The grant above mentioned carried with it, among other things, not only the exclusive possession of the lands described for the construction of a railroad, but also the right to erect thereon all structures necessary and essential to its operation.—Smith v. Northern Pacific Ry. Co., 539.

Same.

11. When a grant of a right of way is made to a railroad without restrictions, it contemplates not merely the railroad as established in the first instance, but the railroad with all its necessary appurtenances as it may from time to time come necessarily to be.—Smith v. Northern Pacific Ry. Co., 539.

Same—Rights of Subsequent Grantees—Injury to Property.

12. *Held*, that since the grant of land to the Northern Pacific Railroad Company for right of way purposes contemplated at the outset the erection and maintenance of such structures, equipment and machinery necessary for the operation of the railroad as it might be established in the first instance and come thereafter to be, and since coal-docks in its railroad yards near a city are necessary appliances, plaintiffs, as subsequent grantees of land adjacent to defendant company's right of way taking title from the United States, the common grantor,

hold subject to the rights vested in the company by the prior grant, and are therefore not entitled to recover damages for injury to their property caused by coal-dust, soot, smoke, noises, *etc.*, occasioned by the operation of such coal-docks.—*Smith v. Northern Pacific Ry. Co.*, 539.

RAPE.

See Criminal Law, 1-8.

RATIFICATION.

See Contracts, 14.

REAL PROPERTY.

See, also, Adverse Possession.

Mining claims—Taxation,—see Mines and Mining Claims, 1-3.

Injury to property by operation of railroads,—see Railroads, 9-12.

Option—Escrow—Title in Whom.

1. Title to land which is the subject of an option contract and a deed to which is executed and deposited in escrow, accompanied by a part payment to be credited upon the purchase price, remains in the owner until delivery of the deed by the depository to the buyer.—*Tyler v. Tyler*, 65.

Same—Title—Doctrine of Relation.

2. In view of the statutory rule that until delivery of a deed placed in escrow, title remains in the grantor (Rev. Codes, sec. 4599), delivery of a deed may not be held, under the doctrine of relation, to relate back either to the date of the instrument or its delivery to the depository.—*Tyler v. Tyler*, 65.

Warranty Deeds—Mortgages—Cancellation—Party Plaintiff.

3. Where real estate is sold under a deed warranting title against encumbrances, the grantor may, after he has parted with title, maintain suit to have a mortgage, placed in record after he became the owner and of the existence of which he was unaware, canceled of record.—*Kersten v. Coleman*, 82.

Decree.

4. Where plaintiff was justly entitled to a decree canceling a mortgage of record, the action of the court in designating the county clerk to cancel the instrument, instead of appointing a commissioner to do so, gave defendant no cause for complaint.—*Kersten v. Coleman*, 82.

Contract of Sale—Cancellation—Restoration of Part Payment—Complaint.

5. A vendor seeking the aid of a court of equity to have a contract of sale of land canceled as a cloud upon his title, it having been breached by the purchaser by his failure to make payment of installments as they fell due, need not, as he would be compelled to do in an action to rescind, allege in his complaint that he has restored, or offered to restore, partial payments theretofore made.—*Suburban Homes Co. v. North*, 108.

Same—Recovery of Part Payments, When.

6. As a general rule, the law forfeits to the vendor—the innocent party—all payments made in part performance by the purchaser—the defaulting party—when the latter stops short of full performance by failure to make full payment; where, however, the latter can allege and prove that his default was not the result of his grossly negligent, willful or fraudulent breach of duty, he may recover payments made prior to the breach, provided he make full compensation to the vendor.—*Suburban Homes Co. v. North*, 108.

Same—Improvements on Land—Recovery, When.

7. To entitle a defaulting purchaser to reimbursement for improvements made on the land, a contract of sale of which plaintiff seeks to have rescinded, he must make a showing of some equitable basis for it, as, for instance, that the improvements were within the contemplation of the parties when the contract was made, *etc.*—*Suburban Homes Co. v. North*, 108.

Same—Improvements—Measure of Recovery.

8. In the absence of some provision in a contract of sale of land fixing a different measure of compensation for improvements placed thereon by the purchaser, the amount recoverable for them is not what it cost to put them on the land, but the enhanced value of the property, not exceeding the amount expended for the improvements, deducting an amount equal to the fair rental value of the premises.—*Suburban Homes Co. v. North*, 108.

Same—Time Essence of Contract—Forfeiture —Waiver.

9. A stipulation in a contract of sale of real estate making time of the essence, and reserving an option to the vendor to terminate the contract for failure of the purchaser to pay any required installments of the purchase price, may be waived by the vendor.—*Suburban Homes Co. v. North*, 108.

Same—Forfeitures—Duty of Vendor.

10. Default in the payment of any installment of the purchase price called for in a contract of sale of real estate is a distinct breach, and gives the vendor a right to declare a forfeiture as stipulated in the contract; but the right must be promptly exercised, or the vendor will be presumed to treat the contract as still valid and existent.—*Suburban Homes Co. v. North*, 108.

Same—Default in Payment—Rights of Vendor.

11. A vendor who grants time to the purchaser to pay installments of the purchase price, though the contract makes time of the essence and stipulates for a forfeiture for nonpayment of any installment at maturity, may, on the default, continuing, demand payment of the balance due and give notice of his purpose to terminate the contract in the event of further default; and where the purchaser after such notice does not pay within a reasonable time, the vendor may terminate the contract.—*Suburban Homes Co. v. North*, 108.

Same—Cancellation—Tender of Deed—Failure to Allege—When Immaterial.

12. Where plaintiff, in an action to cancel a contract of sale of land, tendered to a deed at the trial, and defendant failed to make payment of the balance due on the purchase price, the latter was in no position to claim error because of plaintiff's omission to allege in his complaint that demand upon defendant for payment was accompanied by a deed.—*Suburban Homes Co. v. North*, 108.

Occupancy—Presumptions.

13. In the absence of evidence to the contrary, one's occupancy of a house must be treated as rightful; no inference of wrongful occupancy being permissible.—*McLaughlin v. Bardsen*, 177.

Duty of Owner Toward Trespasser—Common-law Liability.

14. At common law the land owner is required merely to refrain from any intentional or wanton acts occasioning injury to a trespasser upon his property.—*McLaughlin v. Bardsen*, 177.

Who Deemed Owner.

15. Persons in possession of land under an easement must be treated as the owners for the purpose of determining whether they owed any duty to one who sustained personal injuries while upon the premises.—*McLaughlin v. Bardsen*, 177.

Sale—Oral Agreement—Statute of Frauds.

16. Where a contract for the sale of land rested upon an oral agreement, part payment of the purchase price, the assumption of possession by the vendee and the erection of buildings and other improvements thereon with the knowledge and consent of the vendor, followed by a tender of the balance of the purchase money, constituted such part performance as took it out of the operation of the statute of frauds.—*Milwaukee Land Co. v. Ruesink*, 489.

Contracts—Assignment.

17. Assignability of contracts being the rule and nonassignability the exception, in the absence of a stipulation to the contrary in an oral agreement to sell land, the right conferred by it was assignable.—*Milwaukee Land Co. v. Ruesink*, 489.

Forfeitures—Duty of Vendor.

18. After the vendor of land had extended indulgence to the vendee in the matter of making payment of installments until the last one fell due, he could not declare a forfeiture without tendering a conveyance or accompanying the demand for payment with an offer to convey.—*Milwaukee Land Co. v. Ruesink*, 489.

Same.

19. Under a contract of sale, the obligation of the vendor to convey title—then in the United States—was concurrent with the vendee's obligation to pay the balance of the purchase price remaining unpaid; hence until the former had acquired title and tendered or offered a conveyance, he was not in a position to terminate the contract for failure to pay the last installment.—*Milwaukee Land Co. v. Ruesink*, 489.

Assignment of Contract—Right of Partner.

20. Where a firm was the owner of a right to have title to realty conferred to it, one of its members could rightfully make an assignment thereof while the partnership was in existence; if in process of liquidation, the assignment was good also, under section 5502; and if not authorized to act as liquidating partner, it was valid where the assignee paid value relying upon the credit of the firm and the consideration was devoted to its benefit.—*Milwaukee Land Co. v. Ruesink*, 489.

Tender—What may Constitute.

21. Where the assignee of a contract of sale of land has forwarded a draft to a director of plaintiff corporation—the vendor—to be used to pay the balance due, who, at the time the assignee filed his answer in an action in ejectment, still retained it, the allegation that defendant was willing that plaintiff should retain it in payment of such balance, together with the fact that at the trial it was deposited with the clerk, constituted a tender of the amount due and a payment of it into court for plaintiff's benefit.—*Milwaukee Land Co. v. Ruesink*, 489.

Ejectment—Pleading and Proof—Immaterial Variance.

22. Where, in an action in ejectment, defendants relying upon a contract for the sale of the premises, the evidence though not technically corresponding to the allegations of the answer, did support them in their general scope and meaning, the divergence relating to the mode and time of payment of the final installment of the purchase money only, a finding in favor of plaintiff on the ground of variance was error.—*Milwaukee Land Co. v. Ruesink*, 489.

RECEIVERS.

See, also, Banks and Banking, 1, 2, 4, 5.

Appointment—Action Pending.

1. An action may not be brought solely for the appointment of a receiver; to justify such appointment there must be an action pending.—*State ex rel. First T. & S. Bank v. District Court*, 259.

Parties.

2. A receiver does not by virtue of his appointment become a party to the action in which, as a matter of ancillary relief, he was appointed.—*State ex rel. First T. & S. Bank v. District Court*, 259.

Nonappealable Orders.

3. An order annulling an order appointing a receiver is not appealable, but may be reviewed on appeal from the final judgment.—*Taintor v. St. John*, 358.

Appointment—Vacating and Abrogating Order—Effect.

4. An order vacating an order appointing a receiver, in effect discharges the receiver and relieves him and the party at whose instance he was appointed from liability on account of the receivership, but an order abrogating such an order blots out the receivership as from the beginning, and leaves the party who procured the appointment liable for the expense incurred by reason of the receivership, over what it would have been if a receiver had not been appointed.—*Taintor v. St. John*, 358.

Validity of Appointment—Failure to Appeal—Estoppel.

5. Neither failure to appeal from an order appointing a receiver, nor subsequent orders of the judge directing the receiver in the management and disposition of the property in his charge, were conclusive as to the propriety of the appointment so as to prevent a subsequent order annulling it.—*Taintor v. St. John*, 358.

Orders—District Judges—Powers.

6. An order annulling an order appointing a receiver could properly be made by the successor in office of the judge who made the appointment.—*Taintor v. St. John*, 358.

Appointment—Partnership—Annulment of Order—Costs and Expenses—Erroneous Judgment.

7. Where an order appointing a receiver of a partnership composed of two at the suit of one of them was annulled after all costs and expenses of the receivership had been paid out of receivership funds, the court committed error in adjudging that defendant recover from plaintiff the full amount of such costs and expenses; inasmuch as the receivership funds were owned by plaintiff and defendant in equal proportions, judgment for one-half of the expenses was all defendant was entitled to.—*Taintor v. St. John*, 358.

RECORDS ON APPEAL.

Evidence consisting entirely of affidavits—How viewed on appeal,—see Appeal and Error, 13.

On appeal from order vacating default judgment,—see Appeal and Error, 6, 7.

Sufficiency,—see Appeal and Error, 11, 12.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

RELATION.

Doctrine of,—see Real Property, 2.

REPLY.

Office of,—see Pleading and Practice, 9, 13.

RESCISSION.

See Sales, 1, 8, 9; Cancellation of Instruments.

RES IPSA LOQUITUR.

See Evidence, 22, 23.

SALES.

Rescission—Pleading and Proof—Insufficiency.

1. Where, in action on a note given in payment of a plow, defendant did not plead a rescission and his evidence did not show any demand for the note, and made it clear that his alleged offer to return the implement amounted to no more than a notification that it was at a certain place at plaintiff's disposal, the claim that his defense was based upon his right to rescind had no merit.—*Jones v. Armstrong*, 168.

Express Warranty—What Does not Constitute.

2. The statement by the seller of a plow that it had done good work for him at sod-breaking was not, in the absence of reliance thereon by the buyer, an express warranty.—*Jones v. Armstrong*, 168.

Second-hand Articles—Implied Warranty.

3. One knowingly buying a second-hand article from a person not a dealer or manufacturer, relying upon his own judgment, takes it unaccompanied by an implied warranty as to its fitness for a special purpose.—*Jones v. Armstrong*, 168.

Warranty—Burden of Proof.

4. Where breach of warranty of a piece of machinery for a certain purpose is relied upon, in an action to recover its purchase price, the burden of showing unfitness resting upon defendant is not sustained by evidence that upon a test it did poor work, unless it is also shown that the adjustment and operation were correct at the time of the test.—*Jones v. Armstrong*, 168.

Delivery and Payment Concurrent—Condition Precedent to Delivery—Breach.

5. Where delivery of a carload of oats and payment therefor were to be concurrent at shipping point, the buyer was required, in his action for breach of the contract of sale, to show an offer and ability to pay at that point.—*Jenderson v. Hansen*, 216.

Checks—Evidence—Admissibility.

6. Plaintiff having alleged in his complaint that he had given to defendant a check as part payment to insure acceptance of the oats, evidence that upon inquiry of the bank upon which it was drawn, whether it was good, a negative answer was received, was properly admitted.—*Jenderson v. Hansen*, 216.

Checks—Telephone Conversations—Evidence—Admissibility.

7. Inquiry of the bank on which a buyer had given him a check, whether there were funds sufficient to meet it, could properly be made by the seller in person, or by telephone, or through another;

hence evidence that the desired information was obtained through the medium of an employee of another bank by telephone was admissible.—Jenderson v. Hansen, 216.

Breach of Warranty—Remedies.

8. A buyer of an article under a guaranty as to its fitness for the purpose for which it is bought may, upon discovery of defects after a fair trial, if the facts warrant it, either (1) rescind the contract and sue for recovery of the price; (2) retain the article and bring action for damages for breach of warranty; or (3) sue for the fraud practiced upon him.—Doornbos v. Thomas, 370.

Election of Remedies.

9. A purchaser of a piece of farming machinery under an alleged warranty who elected to rescind the contract of purchase, receiving back the consideration paid for it, was bound by his election, and could not thereafter sue for a breach of the warranty.—Doornbos v. Thomas, 370.

SAVINGS BANK.

See Banks and Banking.

SETOFF.

See Banks and Banking, 1, 2, 4.

SPECIAL IMPROVEMENTS.

Noncompliance with statutory requirements—Effect.—see Cities and Towns, 4.

STATE BOARD OF EXAMINERS FOR NURSES.

See Nurses.

STATE LANDS.

Leasing,—see Mandamus, 4, 5.

STATUTE OF FRAUDS.

Real Property—Sale—Oral Agreement.

1. Where a contract for the sale of land rested upon an oral agreement, part payment of the purchase price, the assumption of possession by the vendee and the erection of buildings and other improvements thereon with the knowledge and consent of the vendor, followed by a tender of the balance of the purchase money, constituted such part performance as took it out of the operation of the statute of frauds.—Milwaukee Land Co. v. Ruesink, 489.

STATUTE OF LIMITATIONS.

See, also, Laches, 1, 2.

Official Bonds—Action on.

1. The duty of a county treasurer to receive, keep safely and account for all moneys of the county as well as those directed by a court or statute to be deposited with him for safekeeping, is one imposed by express statutory requirement (Rev. Codes, sec. 2986); hence an action on the official bond of such an officer is on "a liability created by statute" which is barred in two years by subdivision 1 of section 6449, Revised Codes.—Gallatin County v. United States Fidelity & Guaranty Co., 55.

STATUTES.

(List of Statutes of Montana Cited or Commented upon.)

CODIFIED STATUTES OF 1871.	
Page 593 (Mining).....	186
COMPILED STATUTES OF 1887.	
First Division, section 257.....	416
Second Division, sections 461, 463.....	74
Fourth Division, section 255.....	186
Fifth Division, section 1370.....	52
Fifth Division, sections 1374-1376.....	53
CIVIL CODE OF 1895.	
Sections 1746, 1748.....	74
Sections 1000, 1001.....	580
CODE OF CIVIL PROCEDURE OF 1895.	
Section 2211.....	580
Section 1059.....	416
PENAL CODE OF 1895.	
Section 704.....	186
LAWS OF 1899.	
Page 149 (Mining).....	186
Page 88 (State Lands).....	406
REVISED CODES OF 1907.	
Section 15.....	416
Sections 82-92.....	137, 141
Section 83.....	141
Section 384.....	62
Section 420.....	25, 26, 336, 342
Section 450.....	338
Section 451.....	338
Sections 452-455.....	343
Section 905.....	236
Section 1881.....	225 <i>et seq.</i>
Section 1882.....	228
Section 1883.....	225
Section 2161.....	406
Section 2162.....	406
Section 2500.....	163
Section 2581.....	167
Section 2741.....	167
Section 2742.....	168
Section 2744.....	168
Section 2745.....	167
Section 2883.....	251
Section 2976.....	62
Section 2986.....	62
Sections 3216-3218.....	25
Section 3220.....	25
Section 3259.....	581
Section 3259, subds. 6, 75.....	77 <i>et seq.</i>
Sections 3367-3429.....	77
Sections 3369, 3370.....	77 <i>et seq.</i>
Section 3678.....	393, 394
Section 3679.....	392, 393

Section 3708.....	70, 73
Section 3716.....	70
Section 3741.....	394, 395
Section 3742.....	394
Section 3833.....	572
Sections 3923-3944.....	20
Section 3937.....	15
Sections 3945-3958.....	20
Section 4308.....	101
Section 4400.....	581
Section 4596.....	71
Section 4599.....	72, 73
Section 4686.....	87
Section 4726.....	154
Section 4732.....	151
Section 4749.....	72, 74
Section 4751.....	72, 74
Section 4820, subds. 2, 4.....	468, 469
Section 4892.....	47
Section 4901.....	505
Section 4903.....	219
Section 4926.....	286
Sections 4958, 4959.....	47
Section 4973.....	472
Section 4982.....	472
Section 4984.....	470, 472
Section 5062.....	379
Section 5063.....	114, 472
Section 5065.....	474, 475
Section 5067.....	48
Section 5104.....	176
Section 5110.....	212
Section 5121.....	379
Sections 5482, 5483.....	505
Section 5501.....	505
Section 5502.....	505
Section 5509.....	382 <i>et seq.</i>
Section 5680.....	449
Section 5686.....	453
Section 5742.....	48
Section 5774.....	509
Section 5775.....	514
Section 5875.....	449
Section 5912.....	449
Section 6039.....	115
Section 6043.....	21
Section 6044.....	232
Section 6049.....	211
Section 6106.....	504
Section 6112.....	472
Section 6113.....	475
Section 6115.....	86, 87
Section 6267.....	338, 342
Section 6269.....	338 <i>et seq.</i>
Section 6315.....	262, 439
Section 6324.....	431, 440
Section 6388.....	367, 368
Section 6393.....	91
Section 6409.....	89

Section 6420.....	95
Sections 6436-6438.....	401 <i>et seq.</i>
Section 6438.....	401
Section 6439.....	403
Section 6445.....	60, 61
Section 6447, subd. 3.....	60, 61
Section 6447, subd. 1.....	60
Section 6449.....	473
Section 6478.....	17
Section 6495.....	356, 357
Section 6537.....	121
Section 6539.....	388, 485
Section 6541.....	45
Section 6549.....	312
Section 6585.....	504
Section 6586.....	504
Section 6698.....	263
Section 6703.....	262
Section 6719.....	121
Section 6740.....	415 <i>et seq.</i>
Section 6761.....	498
Section 6766.....	498
Section 6767.....	498
Section 6787.....	589
Section 6788.....	588
Section 6794.....	485, 486
Section 6796.....	4, 376
Section 6798.....	4
Section 6799.....	377
Section 6800.....	3
Section 7034.....	585
Section 7035.....	585
Section 7036.....	585
Section 7098.....	362
Section 7113.....	194
Section 7114.....	377
Section 7118.....	21
Sections 7147-7148.....	195
Section 7203.....	252
Section 7204.....	261
Section 7205.....	261
Section 7206.....	261
Section 7209.....	261
Section 7214.....	407, 579
Section 7228.....	292
Section 7290.....	52, 53, 573
Section 7291.....	52
Section 7293.....	52
Sections 7293-7295.....	54
Section 7309.....	301, 369
Section 7311.....	301 <i>et seq.</i>
Section 7317.....	301
Section 7322.....	302
Section 7397.....	158
Section 7400.....	151
Section 7603.....	72
Sections 7614-7626.....	72, 73
Section 7753.....	432
Section 7761.....	433

Sections 7764-7767.....	433
Section 7765.....	432
Section 7766.....	432
Section 7767.....	509
Section 7850.....	238
Section 7861.....	39
Section 7911.....	236
Section 7914.....	438
Section 7926.....	39
Section 7972.....	537
Section 8020.....	451
Section 8306.....	350, 353
Section 8324.....	351
Section 8535.....	186 <i>et seq.</i>
Section 9194.....	32
Section 9204.....	33
Section 9208.....	33
Section 9244.....	416
Section 9377.....	305
Section 9556.....	93
Sections 9573-9575.....	94
Section 9773.....	305

LAWS OF 1909.

Chapter 105 (Railways).....	527
Chapter 114 (Disqualification of Judges).....	261, 439, 508
Chapter 135 (Taxation).....	167

LAWS OF 1911.

Chapter 112 (New Counties).....	249
---------------------------------	-----

LAWS OF 1913.

Chapter 5 (Vacancies).....	251
Chapter 14 (District Judges).....	332
Chapter 50 (Nurses).....	294 <i>et seq.</i>
Chapter 76 (School Laws).....	39, 316 <i>et seq.</i>
Chapter 133 (New Counties).....	435
Pages 612, 613 (Corrupt Practices Act).....	137

STATUTES AND STATUTORY CONSTRUCTION.

Mechanics' Liens—Liberal Construction of Statute.

1. After the necessary statutory steps toward securing a mechanic's or materialman's lien have once been taken, the lien law is subject to the most liberal construction.—Stritzel-Spaberg Lumber Co. v. Edwards, 49.

Cities and Towns—Special Street Improvements—Statutes.

2. To the lawful opening and widening of a street and the acquisition of property necessary therefor at the expense of abutting owners, compliance with the procedure requirements of sections 3369 and 3370, Article X of Part IV, Title III, Chapter III, Revised Codes, relating to special improvements, is necessary.—Kohn v. City of Missoula, 75.

Effect of Statute Initiated by Electors.

3. An Act initiated by the people has no greater efficacy than one enacted by the legislature, in so far as its constitutionality is concerned. State ex rel. Smith v. District Court, 134.

Interpretation—Means Available.

4. The arrangement and classification of statutes, their titles and head-notes, are proper and available means from which to determine legislative intent.—*McLaughlin v. Bardsen*, 177.

Penal Statutes—Extension by Implication.

5. A highly penal statute cannot be extended by implication.—*McLaughlin v. Bardsen*, 177.

Interpretation—Rule.

6. In the interpretation of statutes, every word therein used must be given some meaning, if possible.—*State ex rel. Patterson v. Lentz*, 322.

Same.

7. In the interpretation of statutes, resort should first be had to the ordinary rules of grammar.—*In re McDonald*, 348.

SUPERVISORY CONTROL.

See, also, District Courts, 11–15.

Scope of Writ.

1. The writ of supervisory control issues only to correct rulings made by the district court acting within jurisdiction, where there is not an appeal or the remedy by appeal cannot afford adequate relief, and gross injustice is threatened as the result of such rulings.—*State ex rel. Carroll v. District Court*, 428.

SURETIES.

See, also, Statute of Limitations, 1.

Official Bonds—Suretyship—Nature of Undertaking.

1. Held, under *City of Butte v. Goodwin*, 47 Mont. 155, that the liability of a surety on an official bond is not founded upon an "instrument in writing"—the contract of suretyship—in the sense in which that term is used in section 6445, Revised Codes, limiting to eight years the time within which an action "founded upon an instrument in writing" may be brought.—*Gallatin County v. United States F. & G. Co.*, 55.

TAXATION AND TAXES.

Mining claims,—see Mines and Mining, 1–3.

Public Lands—Equitable Title.

1. Where one qualified to enter public land has fully complied with the federal statute and the rules and regulations of the Interior Department promulgated to carry its provisions into effect, and his application has been finally approved, but has not yet received patent, he is vested with an equitable interest in the land which is subject to taxation.—*Johnson v. County of Lincoln*, 253.

Same—Regulations of Land Department—Effect of.

2. Rules of the Interior Department, promulgated to carry into effect statutes relating to the disposition of public lands, have the force of statutes and will be judicially noticed by the courts.—*Johnson v. County of Lincoln*, 253.

Same—Power of State.

3. A state is without power to tax public lands held by one under a preferential right of entry when surveyed and opened to settlement; hence, where such land is sold for delinquent taxes, the deed conveys no interest in it.—*Johnson v. County of Lincoln*, 253.

Same—Delinquent Tax Sales—Injunction—Complaint—Insufficiency.

4. Where it appeared from the complaint in an action to enjoin a county treasurer from selling land for delinquent taxes, that plain-

tiff had neither equitable nor legal title to the land but only a preferential right of entry, the threatened sale could not cast a cloud upon his title as alleged, and a general demurrer to the complaint was properly sustained.—*Johnson v. County of Lincoln*, 253.

When Power not Existent.

5. A public agency may not, by taxation or otherwise, raise funds which it has no authority to expend.—*Panchot v. Leet*, 314.

Counties—High School Purposes—Limit of Expenditure Without Approval of Electors.

6. *Held*, that a levy for the purpose of erecting a county high school building which would raise in excess of \$40,000 was void where the approval of the expenditure by the electors had not first been secured, as required by the provision of section 5, Article XIII, Constitution of Montana, that no county indebtedness or liability for any single purpose in excess of \$10,000 shall be incurred without the approval of a majority of the electors voting at the election called for that purpose.—*Panchot v. Leet*, 314.

Same—High Schools—Erection of Building—Compulsory Duty of Trustees.

7. *Quære*: Upon the creation of a county high school under Chapter 76, Laws of 1913, is it the absolute duty of the board of trustees to forthwith erect a high school building?—*Panchot v. Leet*, 314.

Same—Compulsory Expenditures—Constitutional Limit.

8. If Chapter 76, Laws of 1913, makes it compulsory upon the board of high school trustees to forthwith erect a high school building after a favorable vote on the question of the establishment of such a school, the cost of which building exceeds the sum of \$10,000, it is invalid in this respect, since the legislature is without power to compel the expenditure of an amount of county funds in excess of such amount (Art. XIII, sec. 5, Const.) without the previous approval of the electors.—*Panchot v. Leet*, 314.

Same—Expenditures Beyond Constitutional Limit—Implied Approval by Electors.

9. By voting for the establishment of a county high school, the electors did not impliedly authorize the expenditure of an unknown sum in excess of the constitutional limit of \$10,000, *supra*, for the erection of a building, to be raised by a levy sought to be enjoined.—*Panchot v. Leet*, 314.

Same—Special Funds—Indebtedness.

10. *Held*, that by placing the funds sought to be raised by the levy referred to above, in a special fund to be used for building purposes only, the constitutional objection would not be obviated, since by the contemplated expenditure thereof in the construction of a high school building a contract liability for a single purpose in excess of \$10,000 would necessarily be incurred without the approval of the electors.—*Panchot v. Leet*, 314.

Adverse Possession—Payment of Taxes.

11. Payment of taxes is not an element of adverse possession, unless made so by statutory requirement.—*Morrison v. Lynn*, 396.

TAX SALES.

See *Taxation*, 3, 4.

TECHNICALITIES.

Record on appeal,—see *Appeal and Errors*, 11, 12.

TELEGRAPH AND TELEPHONES.

Regulation,—see *Cities and Towns*, 7, 8.

Telephone conversations,—see *Evidence*, 9.

TENDER.

Of deed—Failure to allege,—see Real Property, 12.

What may Constitute.

1. Where the assignee of a contract of sale of land had forwarded a draft to a director of plaintiff corporation—the vendor—to be used to pay the balance due, who, at the time the assignee filed his answer in an action in ejectment, still retained it, the allegation that defendant was willing that plaintiff should retain it in payment of such balance, together with the fact that at the trial it was deposited with the clerk, constituted a tender of the amount due and a payment of it into court for plaintiff's benefit.—*Milwaukee Land Co. v. Ruesink*, 489.

THEORY OF CASE.

See Appeal and Error, 15.

TIME.

Of essence of contract,—see Real Property, 9.

TRESPASS.

Duty of owner of real property toward trespasser,—see Personal Injuries 7, 9, 10.

TRIAL.

See Amendments; Bills of Exceptions; Burden of Proof; Cross-examination; Discretion; District Courts; Evidence; Findings; Instructions; Jury; New Trial; Pleading and Practice; Reopening Case; Variances, Verdicts.

TURNTABLE DOCTRINE.

See Personal Injuries, 2-4.

VACANCIES.

On board of county commissioners,—see Certiorari, 1.

See, also, Office and Officers, 2, 3.

VARIANCE.

See, also, Railroads, 1.

Same—Ejectment—Pleading and Proof—Immaterial Variance.

1. Where, in an action in ejectment, defendants relying upon a contract for the sale of the premises, the evidence, though not technically corresponding to the allegations of the answer, did support them in their general scope and meaning, the divergence relating to the mode and time of payment of the final installment of the purchase money only, a finding in favor of plaintiff on the ground of variance was error.—*Milwaukee Land Co. v. Ruesink*, 489.

VENDOR AND PURCHASER.

See Real Property.

VERDICTS.

When conclusive,—see Appeal and Error, 2.

Setting Aside—New Trial—Power of District Court.

1. While the district court may refuse to receive a verdict which is informal or insufficient, it cannot set it aside upon substantial grounds

save by granting a new trial, nor grant a new trial except upon motion made in the manner, within the time and upon the grounds specified in the Codes.—*State ex rel. Jones v. District Court*, 1.

Construction.

2. Under the rules that a verdict is not to be technically construed but must be given such a reasonable construction as will carry out the obvious intention of the jury, and that the law regards that as certain which can be made certain, *held* that a verdict was sufficient to warrant entry of judgment thereon, though its formal appearance lent support to the contention that the jury returned three verdicts.—*State ex rel. Jones v. District Court*, 1.

Codefendants—Verdict as to One—Effect.

3. Where the complaint in a personal injury action charged the defendant railway company with primary negligence as well as with responsibility for the failure of its switching crew—two members of which only were made defendants—to exercise care in making a coupling and to ring the bell of the locomotive, and the jury found against all, though the evidence did not connect the individual defendants with the cause of the injury, a reversal of the judgment as to them did not necessitate the same result as to the company.—*Mullery v. Great Northern Ry. Co.*, 408.

Verdict not Excessive.

4. Plaintiff was earning \$3.25 per day when hurt; his injuries consisted of a scalp wound, the loss of two fingers of his right hand, and the crushing of a third, the fracture of a bone of the thumb of the left hand, inside of which a growth is developing; he was unable to work for four months; has lost his earning capacity as a carpenter and an all-around man, suffered pain and sustained a permanent mutilation. *Held*, that a verdict for \$5,000 was not excessive.—*Mullery v. Great Northern Ry. Co.*, 408.

Excessive Verdicts.

5. In determining whether a verdict is so excessive as to show passion or prejudice on the part of the jurors, the time devoted to the consideration of the case by them, though not decisive, may be taken into account.—*Chenoweth v. Great Northern Ry. Co.*, 481.

District Court may Direct, When.

6. If the evidence in a jury case is such that reasonable men can come to but one conclusion thereon, the court may direct a verdict in favor of the party entitled to it, or withdraw the case from the jury and render judgment.—*Milwaukee Land Co. v. Ruesink*, 489.

WAIVER.

Criminal Law—Irregularities.

1. Under section 9194, Rev. Codes, by entering his plea without a written motion to set aside the information and consenting to go to trial, defendant waived his right to question the propriety of proceedings prior to the filing of the information.—*State v. Vinn*, 27.

Real Property—Contract of Sale—Forfeitures.

2. A stipulation in a contract of sale of real estate making time of the essence, and reserving an option to the vendor to terminate the contract for failure of the purchaser to pay any required installments of the purchase price, may be waived by the vendor.—*Suburban Homes Co. v. North*, 108.

Findings—Complaint—Ambiguity—Failure to Demur.

3. Failure to demur to a complaint for ambiguity operates as a waiver of such defect, under section 6539, Revised Codes.—*Keffler v. Wilda*, 387.

Peremptory Challenges.

4. Where codefendants, though antagonistic to each other, do not separately attempt to exercise their right to peremptorily challenge the jurors in turn with the plaintiff, they waive their right in this respect.—*Chenoweth v. Great Northern Ry. Co.*, 481.

WARRANTIES.

Breach—Remedies,—see *Contracts*, 5; *Sales*, 8, 9.

Express and implied,—see *Sales*, 2-4.

Warranty deed—Right of grantor to maintain suit to cancel outstanding mortgage,—see *Real Property*, 3.

WATERS AND WATERCOURSES.

Washing away of embankment,—see *Railroads*, 8.

WILLS.

Contest,—see *Probate Proceedings*.

WORDS AND PHRASES.

"Civil contempt"—

In re Mettler, 301.

"Claim of title"—

Morrison v. Linn, 401.

"Collateral security"—

Averill Machinery Co. v. Bain, 514.

"Color of title"—

Morrison v. Linn, 401.

"Commercial banks"—

Williams v. Johnson, 20.

"Constructive contempt"—

In re Mettler, 301.

"Conveyance"—(*Rev. Codes*, sec. 3708.)

Tyler v. Tyler, 73.

"Criminal contempt"—

In re Mettler, 301.

"Cut" on mining claim—

McLaughlin v. Bardsen, 187.

"Direct contempt"—

In re Mettler, 301.

"Doing business"—

Keffler v. Wilds, 384.

"Due process of law"—

State ex rel. Marshall v. District Court, 296.

"Each party"—(*Rev. Codes*, sec. 6740.)

Mullery v. Great Northern Ry. Co., 416.

"Excavation"—

McLaughlin v. Bardsen, 188.

"Grant"—

Brundy v. Canby, 477.

"Incompatible" offices—

State ex rel. Klick v. Wittmer, 24.

"In due form"—

Adams v. Stenehjem, 236.

"Irregularly levied and demanded,"—taxes—

Barnard Realty Co. v. City of Butte, 167.

"Jurisdiction" in *habeas corpus*—

In re Mettler, 360.

"Kidnaping"—

In re McDonald, 350.

"Mentally incompetent"—(Rev. Codes, sec. 7764.)

State ex rel. Carroll v. District Court, 433.

"Mistake"—

Brundy v. Canby, 472.

"Motion"—(Chap. 114, Laws 1909.)

State ex rel. Working v. District Court, 439.

"Next general election"—

State ex rel. Patterson v. Lentz, 337.

"Novation"—

Kinsman v. Stanhope, 46.

"Obligation"—

Kinsman v. Stanhope, 47.

"Or"—(Chap. 14, Laws 1913.)

State ex rel. Patterson v. Lentz, 336.

"Party"—(Rev. Codes, sec. 6740.)

Mullery v. Great Northern Ry. Co., 415.

"Party"—(Chap. 114, Laws 1909.)

State ex rel. Working v. District Court, 439.

"Permit"—

Ball Ranch Co. v. Hendrickson, 228.

"Property"—(Rev. Codes, sec. 7290.)

Stritzel-Spaberg Lumber Co. v. Edwards, 53.

"Regulations"—(Const., Art. XV, sec. 14.)

City of Butte v. Montana Indep. Tel. Co., 580.

"Run at Large"—Animals—

Ball Ranch Co. v. Hendrickson, 228.

"Savings bank"—

Williams v. Johnson, 20.

"Secretly"—(Rev. Codes, sec. 8306.)

In re McDonald, 351.

"Section"—(Rev. Codes, sec. 3379.)

Kohn v. City of Missoula, 81.

- "Side"—(Rev. Codes, sec. 6740.)
 Mullery v. Great Northern Ry. Co., 415.
- "Special election"—
 State ex rel. Patterson v. Lentz, 343.
- "Such improvement"—(Rev. Codes, sec. 3369.)
 Kohn v. City of Missoula, 79.
- "Transacting business"—(Rev. Codes, sec. 5509.)
 Keffler v. Wilds, 383.
- "Until the next general election"—(Const., Art VIII, sec. 34.)
 State ex rel. Patterson v. Lentz, 342.

WORK AND LABOR.

Evidence, insufficiency,—see New Trial, 4.

WRITS.

- Affidavit not a pleading—Return, what does not constitute,—see Certiorari, 2, 3.
- "Speedy and adequate remedy" at law,—see Prohibition, 1.
- See, also, Certiorari; Habeas Corpus; Injunction; Mandamus; Prohibition; Supervisory Control.



TABLE OF MONTANA CASES CITED—VOL. 50.

American L. & N. Co. v. Great Northern Ry. Co., 48 Mont. 495.....	505
(Pleadings—Immaterial Departure.)	
Anderson v. Northern Pacific Ry. Co., 34 Mont. 181.....	231
(Negligence—Jury Question.)	
Anderson v. Red Metal Min. Co., 36 Mont. 312.....	356
(Interpleader.)	
Andree v. Anaconda Copper Min. Co., 47 Mont. 554.....	538
(Personal Injuries— <i>Res Ipsa Loquitur</i> .)	
Arnold v. Fraser, 43 Mont. 540.....	478
(Part Payment—Offer to Return—When Unnecessary.)	
Ashley v. Rocky Mt. Bell Tel. Co., 25 Mont. 286.....	211
(Minimizing Damages—Duty of Plaintiff.)	
Ball v. Gussenhoven, 29 Mont. 321.....	312
(Pleadings—Inconsistent Defenses.)	
Barber v. Briscoe, 9 Mont. 341.....	6
(Judgment—Entry <i>Nunc Pro Tunc</i> .)	
Barnard Realty Co. v. City of Butte, 48 Mont. 102.....	162
(Cited.)	
Berlin Machine Works v. Midland C. & L. Co., 45 Mont. 390.....	175
(Sales—Offer to Return—Insufficiency.)	
Best Mfg. Co. v. Hutton, 49 Mont. 78.....	213
(Breach of Contract—Election of Remedies.)	
Birsch v. Citizens' El. Co., 36 Mont. 574.....	311
(Contributory Negligence.)	
Blankenship v. Decker, 34 Mont. 292.....	277
(Contracts— <i>Quantum Meruit</i> .)	
Boston & Mont. etc. Co. v. Montana Ore P. Co., 24 Mont. 142.....	262
(Receivership)	
Bottego v. Carroll, 31 Mont. 122.....	470
(Fraud—Mutual Mistake—Pleadings.) DISTINGUISHED.	
Bourke v. Butte El. Ry. Co., 33 Mont. 267.....	188
(Real Property—Occupancy—Presumptions.)	
Bowen v. Webb, 34 Mont. 61.....	86
(Vacating Default Judgment.)	
Bracey v. Northwestern Imp. Co., 41 Mont. 338.....	528, 530
(Negligence—Pleading and Proof.)	
Brandt v. McIntosh, 47 Mont. 70.....	573
(Corporations—Suits by Stockholders.)	
Brown v. Independent Pub. Co., 48 Mont. 374.....	564
(Libel—Complaint.)	
Canning v. Fried, 48 Mont. 560.....	5
(New Trial.)	
Carlson v. City of Helena, 39 Mont. 82.....	317
(Taxation.)	
Chadwick v. Tatem, 9 Mont. 354.....	72, 74
(Option Contracts.)	
City of Butte v. Goodwin, 47 Mont. 155.....	60
(Suretyship.)	
(Statute of Limitations.).....62, 64	
City of Kalispell v. School District, 46 Mont. 221.....	188
(Words and Phrases.)	

Clark v. American Dev. & Min. Co., 28 Mont. 468.....	114
(Rescission.)	
Clark v. Maher, 34 Mont. 391.....	167
(Void Taxation.)	
Clifton v. Willson, 47 Mont. 305.....	115, 278
(Contracts—Rescission.)	
Cobban v. Hecklen, 27 Mont. 245.....	499
(Statute of Frauds—Part Performance.)	
Cobban v. Hinds, 23 Mont. 338.....	168
(Void Taxation—Remedies.)	
Cohen v. Clark, 44 Mont. 151.....	450
(Theory of Case.)	
Cole v. Helena L. & Ry. Co., 49 Mont. 443.....	158
(Reopening Case—Discretion.)	
Comanche Min. Co. v. Rumley, 1 Mont. 201.....	6
(Judgment—Entry <i>Nunc Pro Tunc</i> .)	
Consolidated G. & S. Min. Co. v. Struthers, 41 Mont. 565.....	4
(Judgment—Entry.)	
(Verdict—Construction.)	6
(Directing Verdict.)	498
Conway v. Monidah Trust, 47 Mont. 269.....	100
(Negligence—Statutory Duty.)	
(Duty of Land Owner to Trespasser.)	189
Cook-Reynolds Co. v. Chipman, 47 Mont. 289.....	114 <i>et seq.</i>
(Contracts—Rescission—Cancellation.)	
Cooper v. Romney, 49 Mont. 119.....	564
(Libel.)	
Cornish v. Woolverton, 32 Mont. 456.....	17
(Assignment.)	
Cotter v. Butte & Ruby V. S. Co., 31 Mont. 129.....	114
(Contracts—Rescission.)	
Craig v. Board, 12 Mont. 203.....	297
(State—Regulation of Profession.)	
Cummings v. Reins C. Co., 40 Mont. 599.....	377
(Notice of Appeal.)	
Cunningham v. Northwestern Imp. Co., 44 Mont. 180.....	296
(Due Process of Law.)	
Dahlman v. Dahlman, 28 Mont. 373.....	70
(Dower.)	
DaRin v. Casualty Co., 41 Mont. 175.....	530
(Negligence—Employee Rescuing Property.)	
Day v. Kelly, 50 Mont. 306.....	531
(Contributory Negligence—Effect of Plea.)	
Delmoe v. Long, 35 Mont. 139.....	475
(Laches.)	
Dempster v. Oregon Short Line Ry. Co., 37 Mont. 335.....	450
(Theory of Case.)	
DeSandro v. Missoula L. & W. Co., 48 Mont. 226.....	422
(Personal Injuries.)	
Dillon v. Great Northern Ry. Co., 38 Mont. 485.....	258
(Cause of Action—Definition.)	
Driscoll v. Clark, 32 Mont. 172.....	101
(Negligence, Turntable Doctrine.)	
(Duty of Land Owner to Trespasser.)	189
Egan v. Montana C. Ry. Co., 24 Mont. 569.....	189
(Duty of Land Owner to Trespasser.)	
Emerson v. McNair, 28 Mont. 578.....	194
(Record on Appeal.)	

Farleigh v. Kelley, 28 Mont. 421.....	151
(Probate Proceedings—Will Contest.)	
(Same—Burden of Proof.).....	158
Flinner v. McVay, 37 Mont. 306.....	499
(Assignment.)	
Ford v. Great Falls, 46 Mont. 292.....	80, 82
(Cities and Towns—Special Improvements.)	
Forquer v. North, 42 Mont. 272.....	427
(Personal Injuries—Excessive Verdicts.)	
Forrester & MacGinniss v. Boston etc. Co., 22 Mont. 430.....	363
(Receivership.)	
Forrester & MacGinniss v. Boston etc. Co., 24 Mont. 148.....	363
(Receivership.)	
Forsell v. Pittsburgh & Mont. Co., 38 Mont. 403.....	484
(Personal Injuries—Joint Tort-feasors.)	
Fratt v. Daniels-Jones Co., 47 Mont. 487.....	114 et seq.
(Rescission—Forfeitures.)	
Gallagher v. Basey, 1 Mont. 457.....	357
(Equity Cases—Findings.)	
Gallick v. Bordeaux, 31 Mont. 328.....	537
(Burden of Proof.)	
Gamer v. Glenn, 8 Mont. 371.....	377
(Notice of Appeal.)	
Gates v. Northern Pacific Ry. Co., 37 Mont. 103.....	102
(Negligence—Turntable Doctrine.)	
Gibson v. Morris State Bank, 49 Mont. 60.....	150, 288, 395, 498, 558
(New Trial—Review of Evidence—Presumptions.)	
Glass v. Basin & Bay State M. Co., 31 Mont. 271.....	46
(Conversion.)	
Golden v. Northern Pacific Ry. Co., 39 Mont. 435.....	484
(Personal Injuries—Codefendants—Verdict.)	
Hale v. Jefferson County, 39 Mont. 137.....	164
(Taxation—Exemption—Burden of Proof.)	
Hardesty v. Largey Lumber Co., 34 Mont. 160.....	186
(Interpretation of Statutes.)	
(Personal Injuries— <i>Res Ipsa Loquitur</i> .).....	537
Harrington v. Butte, A. & P. Ry. Co., 36 Mont. 478.....	5
(Verdict—Setting Aside.)	
Harrington v. Butte & Boston M. Co., 27 Mont. 1.....	105
(New Trial—Appeal.)	
Hauswirth v. Butcher, 4 Mont. 299.....	485
(Inconsistent Pleadings.)	
Hefferlin v. Chambers, 16 Mont. 349.....	317
(Counties—Indebtedness—Constitution.)	
Hefferlin v. Karlman, 29 Mont. 139.....	21
(Judgment—Interest.)	
Helena L. & Ry. Co. v. City of Helena, 47 Mont. 18.....	188
(Personal Injuries.)	
Helena Nat. Bank v. Rocky Mt. Bell Tel. Co., 20 Mont. 379.....	498
(Evidence—Review.)	
Hillman v. Luzon Cafe Co., 49 Mont. 180.....	213
(Breach of Contract—Election of Remedies.)	
Hollenback v. Stone & Webster E. Corp., 46 Mont. 559.....	529, 530
(Master and Servant—Personal Injuries.)	
Hoskins v. Northern Pac. Ry. Co., 39 Mont. 394.....	529
(Railways—Disregard of Time Schedule.)	

Hunter v. Montana C. Ry. Co., 22 Mont. 525.....	527
(Railways—Negligence <i>Per Se</i> .)	
Ide v. Leiser, 10 Mont. 5.....	71
(Option Contracts.)	
In re Bloor, 21 Mont. 49.....	91
(Attorneys—Disbarment.)	
In re Downey, 31 Mont. 441.....	350
(<i>Habeas Corpus</i> .)	
In re Farrell, 36 Mont. 254.....	350
(<i>Habeas Corpus</i> .)	
In re Miller's Estate, 37 Mont. 545.....	155
(Wills—Execution.)	
In re McDonald, 50 Mont. 348.....	354
(Cited.)	
In re O'Brien, 29 Mont. 530.....	579
(Cities and Towns—Police Power.)	
In re Weston, 28 Mont. 207.....	430
(Supervisory Control Writ.)	
In re Williams' Estate, 50 Mont. 142.....	191
(New Trial—Power of Substituted Judge.)	
In re Wisner, 36 Mont. 298.....	186, 187
(Interpretation of Statutes.)	
Intermountain Pub. Co. v. Jack, 5 Mont. 20.....	571
(Corporations.)	
Jay v. School District, 24 Mont. 219.....	351
(Interpretation of Statutes.)	
Jensen v. Barbour, 12 Mont. 566.....	438
(Vacating Default Judgment.)	
Johnson v. Butte & Superior C. Co., 41 Mont. 158.....	312, 485
(Pleadings—Inconsistent Defenses.)	
Johnson v. City of Great Falls, 38 Mont. 369.....	579
(Cities and Towns—Police Power.)	
Johnson v. Malette, 34 Mont. 477.....	423
(Personal Injuries—Choice of Ways.)	
Keffler v. Wilds, 50 Mont. 381.....	387
(Cited.)	
Kelly v. City of Butte, 43 Mont. 451.....	105
(New Trial—Appeal.)	
Kerr v. Blaine, 49 Mont. 602.....	48
(Mortgages—Sheriff's Sale.)	
Killeen v. Barnes-King D. Co., 46 Mont. 212.....	423, 425
(Personal Injuries—Choice of Ways.)	
Kipp v. Davis-Daly C. Co., 41 Mont. 509.....	550
(Railways—Eminent Domain.)	
Kipp v. Silverman, 25 Mont. 296.....	45
(Conversion.)	
(Burden of Proof.).....	537
Kleinschmidt v. American Min. Co., 49 Mont. 7.....	573
(Corporations—Suits by Stockholders.)	
Kline v. Hanke, 14 Mont. 361.....	312
(Pleadings—Inconsistent Defenses.)	
Knuckey v. Butte El. Ry. Co., 45 Mont. 106.....	427
(Excessive Verdicts.)	
Latimer v. Nelson, 47 Mont. 545.....	194
(Bills of Exceptions.)	

Ledlie v. Wallen, 17 Mont. 150.....	564
(Libel—Special Damages—Complaint.)	
Leggatt v. Gerrick, 35 Mont. 91.....	21
(Judgments—Interest.)	
Leggat v. Palmer, 39 Mont. 302.....	514
(Pledges.)	
Lewis v. Northern Pac. Ry. Co., 36 Mont. 207.....	427
(Excessive Verdicts.)	
Lyon v. Chicago, M. & St. P. Ry. Co., 45 Mont. 33.....	536
(Cited.)	
Lyon v. Dailey C. M. & S. Co., 46 Mont. 108.....	515
(Construction of Contracts.)	
Lyon v. United States F. & G. Co., 48 Mont. 591.....	363, 364
(Receivership.)	
Manuel v. Turner, 36 Mont. 512.....	276, 378
(Pleading—Reply.)	
Marron v. Great Northern Ry. Co., 46 Mont. 593.....	451
(Evidence—Admissibility.)	
McCrimmon v. Murray, 43 Mont. 457.....	287
(Contracts.)	
McConnell v. Combination M. & M. Co., 30 Mont. 239.....	573
(Corporations—Suits by Stockholders.)	
McGlauffin v. Wormser, 28 Mont. 177.....	54
(Mechanics' Liens.)	
McGowan v. Nelson, 36 Mont. 67.....	
(<i>Res Ipsa Loquitur</i> .)	
Melzner v. Raven Copper Co., 47 Mont. 351.....	422
(Personal Injuries—Verdict.)	
Mercer v. Dver, 15 Mont. 317.....	17
(Banks—Receivers.)	
Monson v. La France C. Co., 39 Mont. 50.....	226, 526
(Negligence—Breach of Statutory Duty—Pleading and Proof.)	
Montague v. Hanson, 38 Mont. 376.....	426
(Personal Injuries—Earning Capacity.)	
Montana Coal & C. Co. v. Livingston, 21 Mont. 59.....	341
(Interpretation of Statutes.)	
Montana Ore Fur. Co. v. Maher, 32 Mont. 480.....	167
(Taxation—Injunction.)	
Morris v. Burke, 15 Mont. 214.....	5
(Setting Aside Verdict.)	
Moss v. Goodhart, 47 Mont. 257.....	573
(Corporations—Suits by Stockholders.)	
Moyse v. Northern Pac. Ry. Co., 41 Mont. 272.....	422
(Personal Injuries—Railways—Assumptions of Risk.)	
Mullery v. Great Northern Ry. Co., 50 Mont. 408.....	485
(Jury—Peremptory Challenges.)	
Murphy's Estate, 43 Mont. 353.....	158
(Will Contests—Burden of Proof.)	
Murray v. City of Butte, 35 Mont. 161.....	212
(Splitting Causes of Action.)	
Murray v. Hauser, 21 Mont. 120.....	498
(Evidence—Review.)	
Murray v. Hinds, 30 Mont. 466.....	165
(Taxation—Exemption—Burden of Proof.)	
National Min. Co. v. Powers, 3 Mont. 344.....	401
(Adverse Possession.)	
Neary v. Northern Pac. Ry. Co., 37 Mont. 461.....	528
(Railways—Duty to Employees.)	

Nelson v. Great Northern Ry. Co., 28 Mont. 297.....	126 <i>et seq.</i>
(Carriers—Liability.)	
Neuman v. Grant, 36 Mont. 77.....	277, 282
(Contract— <i>Quantum Meruit</i> .)	
Newell v. Whitwell, 16 Mont. 243.....	395
(Affidavits—Review on Appeal.)	
Nilson v. City of Kalispell, 47 Mont. 416.....	311
(Contributory Negligence.)	
Northern Pac. Ry. Co. v. Carland, 5 Mont. 146.....	549
(Northern Pacific Land Grant.)	
Northern Pac. Ry. Co. v. Mjelde, 48 Mont. 287.....	163, 165
(Taxation—Exemption.)	
(Constitution—Nature of Instrument.).....	580
Noyes' Estate, 40 Mont. 178.....	154 <i>et seq.</i>
(Wills—Execution.)	
O'Donnell v. City of Butte, 44 Mont. 97.....	312
(Pleading Inconsistent Defenses.)	
O'Brien v. Drinkenberg, 41 Mont. 538.....	480
(Findings—When Unnecessary.)	
Ogle v. Potter, 24 Mont. 501.....	5
(New Trial.)	
O'Malley v. O'Malley, 46 Mont. 549.....	357
(Equity Cases—Findings.)	
O'Neill v. Yellowstone Irr. District, 44 Mont. 492.....	138
(Constitution—Power of Legislature.)	
Osmer v. Furey, 32 Mont. 581.....	453
(Market Value—Evidence.)	
Osterholm v. Boston & Mont. etc. Co., 40 Mont. 508.....	228
(Interpretation of Statutes.)	
(Personal Injuries—Earning Capacity—Evidence.).....	426
Parchen v. Chessman, 49 Mont. 326.....	472
(Equity.)	
Parrott v. McDevitt, 14 Mont. 203.....	6
(Judgments—Entry <i>Nunc Pro Tunc</i> .)	
Pearce v. Butte El. Ry. Co., 40 Mont. 321.....	86
(Vacating Default Judgments.)	
Pearce v. Pearce, 30 Mont. 269.....	394
(Divorce.)	
Perkins v. Allnut, 47 Mont. 13.....	115
(Forfeitures.)	
Pope v. Alexander, 36 Mont. 82.....	480
(Findings.)	
Porter v. Industrial P. Co., 26 Mont. 170.....	5
(New Trial.)	
Porter v. Plymouth G. Min. Co., 29 Mont. 347.....	219
(Sales—Burden of Proof.)	
Potter v. Furnish, 46 Mont. 391.....	345
(Elections—Notice.)	
Raiche v. Morrison, 47 Mont. 127.....	211
(Nominal Damages.)	
(Theory of Case.).....	450
Rairden v. Hedrick, 46 Mont. 510.....	515
(Pledges.)	
Rand v. Butte El. Ry. Co., 40 Mont. 398.....	481
(Contribution.)	

Rausch v. Rausch, 14 Mont. 326.....	479
(Estoppel.)	
Riddell v. Peck-Williamson H. & V. Co., 27 Mont. 44.....	276, 277
(Contracts.)	
Riley v. Northern Pac. Ry. Co., 36 Mont. 545.....	420
(Personal Injuries—Railways.)	
Scilley v. Babcock, 39 Mont. 536.....	86
(Vacating Default Judgment.)	
Scott v. Waggoner, 48 Mont. 536.....	46
(Conversion.)	
Shapard v. City of Missoula, 49 Mont. 269.....	82
(Cities and Towns—Special Improvements.)	
Stadler v. City of Helena, 46 Mont. 128.....	78, 80
(Public Improvements—Statutes.)	
Stadler v. First Nat. Bank, 22 Mont. 190.....	17, 18, 21
(Banks—Receivers.)	
State (<i>ex rel.</i> Anaconda C. M. Co.) v. District Court, 26 Mont. 396.337, 341	
(Interpretation of Statutes.)	
State (<i>ex rel.</i> Boston etc. Min. Co.) v. District Court, 22 Mont. 220....	295
(<i>Mandamus.</i>)	
State (<i>ex rel.</i> Boston etc. Min. Co.) v. District Court, 30 Mont. 193..	305
(Contempt.)	
State (<i>ex rel.</i> Breen) v. District Court, 34 Mont. 107.....	302
(Contempt.)	
State (<i>ex rel.</i> Buckner) v. City of Butte, 41 Mont. 377.....	336
(Offices—Vacancies.)	
State (<i>ex rel.</i> Carleton) v. District Court, 33 Mont. 138.....	489, 508
(Disqualification of Judges.)	
State (<i>ex rel.</i> Carroll) v. District Court, 50 Mont. 506.....	511
(Disqualification of Judges.)	
State (<i>ex rel.</i> Chenoweth) v. Acton, 31 Mont. 37.....	26
(Offices—Vacancies.)	
State (<i>ex rel.</i> Crumb) v. City of Helena, 34 Mont. 67.....	579, 580
(Cities and Towns—Telephone Companies—Rights.)	
State (<i>ex rel.</i> Davis) v. District Court, 30 Mont. 8.....	6
(<i>Mandamus.</i>)	
State (<i>ex rel.</i> Dempsey) v. District Court, 24 Mont. 566.....	407
(<i>Mandamus.</i>)	
State (<i>ex rel.</i> Finlen) v. District Court, 26 Mont. 372.....	407
(<i>Mandamus.</i>)	
State (<i>ex rel.</i> First T. & S. Bank) v. District Court, 50 Mont. 259....	508
(Disqualification of Judges.)	
State (<i>ex rel.</i> Gravely) v. Stewart, 48 Mont. 347.....	294
(<i>Mandamus.</i>)	
State (<i>ex rel.</i> Hickey) v. District Court, 23 Mont. 564.....	407
(<i>Mandamus.</i>)	
State (<i>ex rel.</i> Hickey) v. District Court, 42 Mont. 496.....	195
(Premature Judgment.)	
(Theory of Case.).....	279
State (<i>ex rel.</i> Jackson) v. Kennie, 24 Mont. 45.....	362
(Appealable Orders.)	
State (<i>ex rel.</i> Jacobs) v. District Court, 48 Mont. 410.....	510
(Disqualification of Judges.)	
State (<i>ex rel.</i> Jones) v. Foster, 39 Mont. 583.....	26, 336, 339
(Offices—Vacancies.)	
State (<i>ex rel.</i> Kehoe) v. Stromme, 49 Mont. 25.....	345
(Elections—Notice.)	

State (<i>ex rel.</i> Kellogg) v. District Court, 18 Mont. 370.....	297
(Physicians—Examination—Appeal.)	
State (<i>ex rel.</i> Knight) v. Helena etc. Co., 22 Mont. 391.....	407
(<i>Mandamus.</i>)	
State (<i>ex rel.</i> La France C. Co.) v. District Court, 40 Mont. 206.....	407
(<i>Mandamus.</i>)	
State (<i>ex rel.</i> Livesay v. Smith, 35 Mont. 523.....)	337, 340
(Offices—Vacancies.) OVERRULED.	
State (<i>ex rel.</i> McGowan) v. Sedgwick, 46 Mont. 187.....	339, 340
(Offices—Vacancies.)	
State (<i>ex rel.</i> Mitchell F. Co.) v. Toole, 26 Mont. 22.....	295
(<i>Mandamus.</i>)	
State (<i>ex rel.</i> Quintin) v. Edwards, 40 Mont. 287.....	498
(Evidence—Findings.)	
State (<i>ex rel.</i> Robinson) v. Clements, 37 Mont. 96.....	4
(Judgments.)	
State (<i>ex rel.</i> Rocky Mt. B. Tel. Co.) v. City of Red Lodge, 30 Mont. 338	578, 580
(Cities and Towns—Telephone Companies—Powers.)	
State (<i>ex rel.</i> Rowe) v. Kehoe, 49 Mont. 582.....	340 <i>et seq.</i>
(Offices—Vacancies.)	
State (<i>ex rel.</i> Schneider) v. Cunningham, 39 Mont. 165.....	140
(Departments of Government—Constitution.)	
State (<i>ex rel.</i> Stromberg-Mullins Co.) v. District Court, 28 Mont. 123..	5
(New Trial.)	
State (<i>ex rel.</i> Walkerville) v. District Court, 29 Mont. 176.....	5
(New Trial.)	
State (<i>ex rel.</i> Wilson) v. Willis, 47 Mont. 548.....	26
(Offices—Vacancies.)	
State (<i>ex rel.</i> Working) v. District Court, 50 Mont. 435.....	508
(Disqualification of Judges.)	
State v. Ah Jim, 9 Mont. 167.....	34
(Criminal Law—Information—Indictment.)	
State v. Beeskove, 34 Mont. 41.....	486
(Jurors—Impeaching Verdict.)	
State v. Bloor, 20 Mont. 574.....	91
(Cited.)	
State v. Bowser, 21 Mont. 133.....	32, 36
(Criminal Law—Preliminary Examination.)	
(Rape—Age of Prosecutrix—Evidence.)	37, 38
State v. Brett, 16 Mont. 360.....	34
(Criminal Law—Prosecution—Constitution.)	
State v. Cain, 16 Mont. 561.....	34
(Criminal Law—Constitution.)	
State v. Chevigny, 48 Mont. 382.....	32
(Criminal Law—Preliminary Examination—Information.)	
State v. District Court, 35 Mont. 321.....	300, 350
(<i>Habeas Corpus.</i>)	
State v. District Court, 35 Mont. 51.....	301
(Contempt—District Courts.)	
State v. Holland, 37 Mont. 393.....	138
(Constitution—Power of Legislature.)	
State v. Peel, 23 Mont. 353.....	485
(Jury—Challenges—Waiver.)	
State v. Peres, 27 Mont. 358.....	37
(Rape—Evidence—Admissibility.)	
(Same—Evidence—Sufficiency.)	39
State v. Sloan, 22 Mont. 293.....	485
(Jury—Challenges.)	

State v. Stickney, 29 Mont. 523.....	353
(Criminal Law—Kidnaping.)	
Stevens v. Trafton, 36 Mont. 520.....	499
(Statute of Frauds.)	
Streicher v. Murray, 36 Mont. 45.....	475
(Laches—Inapplicability of Doctrine.)	
Suburban Homes Co. v. North, 50 Mont. 108.....	505
(Contracts—Rescission.)	
Swilling v. Cottonwood L. Co., 44 Mont. 339.....	86
(Vacating Default Judgment.)	
Talbott v. Butte City W. Co., 29 Mont. 17.....	279
(Theory of Case.)	
Tanner v. Bowen, 34 Mont. 121.....	484
(Contribution.)	
Territory v. Clayton, 8 Mont. 1.....	6
(Judgment—Entry <i>Nunc Pro Tunc</i> .)	
Thornton v. Kaufman, 35 Mont. 181.....	276, 378
(Pleadings—Reply.)	
Thornton-Thomas Mer. Co. v. Bretherton, 32 Mont. 80.....	363
(Receivership.)	
Tuohy's Estate, 23 Mont. 305.....	362
(Appealable Orders.)	
Verlinda v. Stone & Webster E. Corp., 44 Mont. 223.....	422
(Personal Injuries—Joint Defendants—Verdict.)	
Vreeland v. Edens, 35 Mont. 413.....	5
(New Trial.)	
Waite v. Shoemaker & Co., 50 Mont. 264.....	378
(Office of Reply.)	
Wallace v. Weaver, 47 Mont. 437.....	212
(New Trial—Nominal Damages.)	
Walters v. Chicago etc. Ry. Co., 47 Mont. 501.....	420
(Personal Injuries—Railways.)	
Wastl v. Montana U. Ry. Co., 24 Mont. 159.....	310
(Contributory Negligence.)	
Western Iron Works v. Montana P. & P. Co., 30 Mont. 550.....	54
(Mechanics' Liens.)	
Western Ranches Ltd. v. Custer County, 28 Mont. 278.....	168
(Void Taxation—Remedies.)	
Westlake v. Keating G. M. Co., 48 Mont. 120.....	422
(Personal Injuries—Assumption of Risk.)	
White v. Chicago etc. Ry. Co., 49 Mont. 419.....	427
(Personal Injuries—Excessive Verdict.)	
Wilkinson v. Northern Pac. Ry. Co., 5 Mont. 538.....	548
(Northern Pacific Land Grant.)	
Wilson v. Barbour, 21 Mont. 176.....	395
(Affidavits—Review on Appeal)	
Woods v. Latta, 35 Mont. 9.....	537
(Burden of Proof.)	
Wright v. Brooks, 47 Mont. 99.....	474
(Laches.)	
(Statute of Frauds.).....	499
Wright v. Commissioners, 6 Mont. 29.....	407
(Parties.)	
Wright v. Matthews, 28 Mont. 442.....	5
(New Trial.)	







